Supreme Court, U. S.
FILED
JUL 26 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-145

THE NORTHERN CHEYENNE TRIBE,
Petitioner,

v.

WILLIAM HOLLOWBREAST *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBJECT INDEX

Page

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions and Executive Orders Involved 3

Statement of the Case 4

The Northern Cheyenne Allotment Act of 1926 5

1968 Amendment of the Northern Cheyenne Allotment Act 8

Decisions Below 10

Reasons For Granting the Writ 10

1. The Decision Below Declared Unconstitutional an Act of Congress Which Resolves a Conflict Between National Energy Policy and the Federal Trust Responsibility to Indians. The Result Endangers the Survival of the Northern Cheyenne People 10

2. This Case is a Product of Congress' Uncertainty About the Nature of Its Power Over Indian Lands Rooted in a Misunderstanding of a Fifth Amendment Decision of this Court 15

3. Based on a Misconstruction of this Court's Holding in *Choate v. Trapp*, the Court Below Drew Erroneous Conclusions About the Extent to Which Congressional Power Over Indian Lands is Limited by the Fifth Amendment 15

4. The Decision Below Conflicts With Decisions of This Court Which Hold That Congress Retains Continuing Power to Alter a Statutory Plan for the Distribution of Tribal Property to Tribal Members 18

Page

5. The Decision of the Court Below Conflicts with Decisions of this Court Which Establish That Congress Need Not Reserve Specifically Its Inherent Power to Amend a Statutory Plan for Allotment 21

6. The Decision Below Conflicts with Decisions of this Court Which Hold That an Allottee Does Not Acquire Vested Rights Until the Allotment is Actually Conveyed 23

7. The Decision Below Conflicts With Decisions of This Court Concerning Rules of Construction for Indian Legislation 25

   a. The Decision Below Applied the Rule of Construction Seeks the Indian Understanding—Yet This Rule Was Inapplicable 25

   b. The Decision Below Misapplied the Rule of Construction That Statutes Enacted for the Benefit of Indians Are to Be Construed in Their Favor 27

   c. The Decision Below Failed To — Yet Should Have — Applied the Rule of Construction Which Broadly Considers the Circumstances Surrounding the Enactment of Indian Legislation 29

Conclusion 31

Appendices:

Appendix A—Opinions Below A-1

Appendix B—Judgments and Orders Below A-30

Appendix C—Constitutional Provisions and Statutes Involved A-38

Appendix D—Tribal Documents A-49

TABLES OF AUTHORITY

Table of Cases

Page

Adams v. Osage Tribe of Indians, 59 F.2d 653 (10th Cir. 1932) *cert. denied*, 287 U.S. 652 (1932)..... 27

Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) 29

Brader v. James, 246 U.S. 88 (1918) 17, 20, 21, 22

British-American Oil Producing Co. v .Board of Equalization, 229 U.S. 159 (1936) 25, 26

Carpenter v. Shaw, 280 U.S. 363 (1929) 17, 27

Chase, Jr. v. United States, 256 U.S. 1 (1921) 20, 21

Cherokee Intermarriage Cases, 203 U.S. 76 (1906) 28

Choate v. Trapp, 224 U.S. 665 (1912) 10, 15, 16, 17, 18, 27, 28

Confederated Bands of Ute Indians v. United States, 330 U.S. 169 (1947) 5

County of Mahnomen v. United States, 319 U.S. 474 (1943)..... 17

Goat v. United States, 224 U.S. 458 (1912) 20, 22

Gritts v. Fisher, 224 U.S. 640 (1912) 16, 17, 19-20, 22

Heckman v. United States, 224 U.S. 413 (1912) 20, 22

Hynes v. Grimes Packing Co., 337 U.S. 85 (1949) 5

Lovey v. Stockslager, Commissioner, 129 U.S. 470 (1889) 24

Lowe v. Fisher, 223 U.S. 95 (1912) 20, 22

Marlin v. Lewallen, 276 U.S. 68 (1928) 27

Mullen v. Pickens, 250 U.S. 590 (1919) 23

Nadeau v. Union Pacific R.R., 253 U.S. 442 (1920) 20, 23

Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942) 5

Sizemore v. Brady, 235 U.S. 441 (1914) 17-18, 20, 22, 23, 24, 25

Page

Squire v. Capoeman, 351 U.S. 1 (1956) 28
Starr v. Long Jim, 221 U.S. 613 (1913) 27
Stephens v. Cherokee Nation, 174 U.S. 445 (1889) 20
Sweet v. Schock, 245 U.S. 192 (1917).....17, 20, 21, 22
Tiger v. Western Investment Co., 221 U.S. 286 (1911) 20, 22
United States v. Bartlett, 235 U.S. 72 (1914) 20, 22
United States v. Chase, 245 U.S. 89 (1917)..... 21
United States v. First National Bank, 234 U.S. 245 (1914) 26-27
United States v. Jackson, 280 U.S. 183 (1930) ..20, 21, 22
United States v. Jim, 409 U.S. 80 (1972) 18-19, 20, 22
United States v. Rowell, 243 U.S. 464 (1917) 20, 22, 23-24
Wallace v. Adams, 204 U.S. 415 (1907) 20, 22
Williams v. Johnson, 239 U.S. 414 (1915) 20
Woodward v. DeGraffenried, 238 U.S. 284 (1915) 23

Constitutional Provisions

U.S. Const. art. III, § 2 15
U.S. Const. amend. V 3, 4, 10, 15, 16, 17, 18

Statutes

Act of March 3, 1893, 27 Stat. 612 16
Act of April 23, 1904, 33 Stat. 302 12
Act of March 1, 1907, 34 Stat. 1015 12
Act of May 30, 1908, 35 Stat. 558 12
Act of June 4, 1920, 41 Stat. 751 12
Northern Cheyenne Allotment Act of June 3, 1926, 44 Stat. 690 ..... 1, 3, 4, 5-6, 7, 8, *et seq.*

Page

Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§461-462 14
Act of July 24, 1947, 69 Stat. 418 ..... 4, 7
Act of Sept. 22, 1961, 75 Stat. 586 ..... 3, 4
Act of July 24, 1968, 82 Stat. 424.....3, 4-5, 8, 9-10, 13
28 U.S.C. § 1254(1) 2

Other Authority

R. Andrist, *The Long Death—The Last Days of the Plains Indians* 70 (1964) 12
Billings Gazette, July 9, 1975 11
Cohen, *Handbook of Federal Indian Law* (1941) 14
67 Cong. Rec. 9886 (1926) 9
Executive Order of November 26, 1884, 1 Kappler, Indian Affairs, Laws and Treaties 860 4
Executive Order of March 19, 1900, 1 Kappler, Indian Affairs, Laws and Treaties 860 4
Hearings on H.R. 7902 before the Committee on Indian Affairs, 73d Cong., 2d Sess. 15-18 (1934)..... 14
H.R. Rep. No. 4996, 59th Cong., 1st Sess. 4 (1906) 27
H.R. Rep. No. 1292, 90th Cong. 2d Sess. 2 (1968) 9
Northern Cheyenne Planning Study, Department of Intergovernmental Relations, Division of Planning and Economic Development, State of Montana (1973) 11, 12
S. Rep. No. 1145, 90th Cong., 2d Sess. 2 (1968) 9
United States Bureau of Mines Study, *Mineral Resources and Their Potential on Indian Lands, Northern Cheyenne Reservation, Big Horn and Rosebud Counties* 23 (unpublished) 11

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner The Northern Cheyenne Tribe respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit which was entered in this proceeding on April 28, 1975. This action was originally brought by the Northern Cheyenne Tribe against the following named defendants, William Hollowbreast, Grace Kingfisher, Raymond Brady, Sr., Kenneth Beartusk, Winona Fox, James Limberhand, Henry Fisher, Bessie Elkshoulder, Nellie Robinson, and Raymond Harris, Sr., as representatives of the class of all allottees, their heirs and devisees, who received allotments pursuant to the Act of Congress of June 3, 1926, 44 Stat. 690, as amended, the Northern Cheyenne Allotment Act.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 505 F.2d 268 (1974). The opinion of the District Court for the District of Montana is reported at 349 F.Supp. 1502 (1972). Both opinions are set out in the Appendix at A-1-29.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 17, 1974; see Appendix at A-33-34. On December 28, 1974, Associate Justice William O. Douglas of the United States Supreme Court entered an order extending the time to file a petition for writ of certiorari to March 1, 1975. On February 19, 1975, Associate Justice William J. Brennan, Jr. of the United States Supreme Court entered an order further extending that time to March 16, 1975. On February 20, 1975, Petitioner filed with the Ninth Circuit Court of Appeals a motion for leave to file an untimely petition for rehearing. On February 28, 1975, the Ninth Circuit Court of Appeals entered an order granting Petitioner leave to file a petition for rehearing and recalling the original mandate; see Appendix at A-31-32. On March 14, 1975, Petitioner filed a petition for rehearing with the Ninth Circuit Court of Appeals. The Court of Appeals invited Respondents to submit briefs, considered the petition for rehearing on the merits, and on April 28, 1975, entered an order denying the petition for rehearing; see Appendix at A-30. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The entire Northern Cheyenne Indian Reservation rests upon a prime, untapped coal deposit of immense economic

value. The initial fate of this deposit was determined in 1926, when Congress enacted the Northern Cheyenne Allotment Act, 44 Stat. 690, which withheld all reservation minerals from allotment, but provided that these minerals would become the property of the allottees or their heirs after 50 years. However, in a 1968 amendment to the Act, 82 Stat. 424, Congress provided that the minerals would remain in tribal ownership in perpetuity.

1. Did the 1926 Act, as amended, endow the allottees, their heirs or devisees[1] with a vested property right in the minerals which is protected by the Fifth Amendment?

2. Did Congress, in enacting the 1926 Act, as amended, relinquish the power to alter the statutory plan contained therein for allotment of the minerals 50 years hence?

3. In resolving the two questions above, is it proper to utilize the following rules of construction which this Court has promulgated to interpret Indian legislation:

a. the rule which seeks the Indian understanding of the legislation;

b. the rule that statutes enacted for the benefit of Indians are to be liberally construed in their favor; and

c. the rule which requires that the circumstances surrounding the enactment of legislation be considered?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND EXECUTIVE ORDERS INVOLVED

United States Constitution, Amendment V:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

1. The 1926 Act specified "the allottees, or their heirs" as recipients of that future allotment. In 1961, Congress amended the Act to add devisees to that group of prospective allottees. Act of September 22, 1961, 75 Stat. 586. Appendix at A-43.

The Northern Cheyenne Allotment Act, as amended: Act of June 3, 1926, 44 Stat. 690; Act of July 24, 1947, 61 Stat. 418; Act of September 22, 1961, 75 Stat. 586; Act of July 24, 1968, 82 Stat. 424. These statutory provisions are set out in the Appendix at A-38-45.

Executive Order of November 26, 1884, 1 Kappler, Indian Affairs, Laws and Treaties at 860, which created the Northern Cheyenne Reservation; Executive Order of March 19, 1900, 1 Kappler Indian Affairs, Laws and Treaties at 860 which enlarged the Northern Cheyenne Reservation; these executive orders are set out in the Appendix at A-45-48.

STATEMENT OF THE CASE

This case arises from Congress' uncertainty about the extent of its power over Indian lands. After determining that all minerals on the Northern Cheyenne Indian Reservation should remain tribally owned, Congress in 1968 repealed the executory portion of its 1926 allotment plan for the Reservation. This executory provision had envisaged a future allotment—in 1976—of all minerals lying beneath the allotted portions of the Reservation's surface. However, in light of the Fifth Amendment, Congress in 1968 was concerned that the 1926 Act had possibly endowed the allottees, their heirs or devisees with a vested, constitutionally-protected property right to the future distribution of the minerals. Accordingly, Congress made the effectiveness of the 1968 Amendment contingent upon the bringing of this suit to determine the issue of congressional power:

> The Northern Cheyenne Tribe is authorized to commence in the United States District Court for the District of Montana an action against the allottees who received allotments pursuant to the Act of June 3, 1926,

> as amended, their heirs or devisees, either individually or as a class, to determine whether under the provisions of the Act of June 3, 1926, as amended, the allottees, their heirs or devisees, have received a vested property right in the minerals which is protected by the fifth amendment. The United States District Court for the District of Montana shall have jurisdiction to hear and determine the action and an appeal from its judgment may be taken as provided by law. If the court determines the allottees, their heirs or devisees, have a vested interest in the minerals which is protected by the fifth amendment, or if the tribe does not commence an action as here authorized within two years from the date of this Act, the first section of this Act shall cease to have any force or effect, and the provisions of section 3 of the Act of June 3, 1926, as amended, shall thereupon be carried out as fully as if section 3 had not been amended by this Act.

Appendix at A-45.

The Northern Cheyenne Allotment Act of 1926

The 1926 Act is an unambiguous piece of legislation with a clear and logical formulation. Section 1 declares the entire Reservation to be the property of the Tribe. This was the first explicit congressional confirmation of the Tribe's title to the Reservation. It endowed the Tribe with "recognized" title to the lands, a vested property interest.[2] In addition, section 1 states explicitly Congress' continuing plenary power over the entire Reservation:

> That the Northern Cheyenne Indian Reservation heretofore set apart by Executive order dated the 19th day of March, 1900, for the permanent use and occupation of the Northern Cheyenne Indians in Montana, be, and the same is hereby declared to be the property of said Indians, *subject to such control and manage-*

2. *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942); *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169 (1947); *Hynes v. Grimes Packing Co.*, 337 U.S. 85, 103 (1949) (dictum).

ment of said property as the Congress of the United States may direct.

Appendix at A-38 (emphasis added).

The allotment provisions are contained entirely in section 2. Section 2 authorizes limited allotments of 160 acres of agricultural and grazing lands to living tribal members. Allotment was to be consummated by the issuance of a trust patent, designating the entire allotment as a homestead, inalienable for 25 years or until death of the allottee:

> Sec. 2. That the Secretary of the Interior be, and he is hereby, authorized to cause to be prepared a complete roll containing the names of all said Northern Cheyenne Indians now living, for whom said reservation was set apart as aforesaid, which roll, when approved by him, shall be the basis for allotting the land on said reservation as herein provided. The Secretary of the Interior shall also cause to be prepared, in such manner as he may deem advisable, a list of the lands of said Indian reservation and to classify same as agricultural, grazing, and land chiefly valuable for the timber thereon. As soon as practicable after the approval of said tribal roll and after the approval of said list of lands classified as above provided, the Secretary of the Interior is hereby authorized to allot in severalty lands classified as agricultural and grazing to the duly enrolled Indians in areas not exceeding one hundred sixty acres to any individual from the lands appearing on said approved lists . . . *Provided*, That trust patents be issued therefor of the form and legal effect authorized by the Act of February 8, 1887, Twenty-fourth Statutes at Large, page 388, as amended, and the lands so alloted and patented shall be designated in each case as a "homestead," which homestead shall remain inalienable and nontaxable for a period of twenty-five years from the date of issuance of patent therefor, or until the death of the allottee.

Appendix at A-38-39.

The remainder of the Act is concerned primarily with identifying those portions of the Reservation immune from allotment, and remaining, therefore in the ownership of the Tribe.

Section 3 excludes the minerals and timber from allotment[3], announces the congressional plan for the transfer of the minerals beneath allotments to the allottees or their heirs after 50 years, and states explicitly Congress' continuing plenary power over all property withheld from allotment. In addition, tribal leasing of the minerals and timber is authorized:

> Sec. 3. That the timber, coal or other minerals including oil, gas, and other natural deposits, on said reservation *are hereby reserved for the benefit of the tribe* and may be leased with the consent of the Indian Council under such rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That at the expiration of fifty years from the date of the approval of this Act the coal or other minerals, including oil, gas, and other natural deposits, of said allotment shall *become* the property of the respective allottees or their heirs: *Provided further*, That the unallotted lands of said tribe of Indians shall be held in common, *subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians.*

Appendix at A-39-40 (emphasis added).

It is this section which raises the ultimate issue in this case: whether the provision allotting minerals after 50 years vests the allottees, their heirs or devisees[4] with a constitutionally-

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3. However, in 1947, by amendment of the Act, the timber on the allotments was granted to the allottees. The 1947 Amendment made a present grant of the timber in the following terms: ". . . the timber on the allotments on the Northern Cheyenne Indian Reservation . . . are hereby declared to be the property of the allottees. . . ." Act of July 24, 1947, 61 Stat. 418. Appendix at 42-43.

4. See note 1, *supra*.

protected right—thereby depriving Congress of the power to alter its plan for future mineral distribution.

Section 4 enumerates additional portions of the Reservation which are withheld from allotment. It also provides that all income from leasing of minerals and timber is to be held as tribal property for the benefit of the Tribe as a whole. Section 5, the final section of the Act, deals exclusively with appropriations.

Allotments were not actually made until 1932. Approximately 53 per cent of the Reservation surface was then allotted[5]. The trust patents making the allotments provide in relevant part:

> NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, has allotted, and by these presents does allot, unto the said Indian, the above-described land as a Homestead, subject to all the provisions, conditions, limitations, and restrictions contained in said Act of June 3, 1926. . . . *There is also reserved for the benefit of the Northern Chyenne Indians, all the coal or other minerals, including oil, gas, and all natural deposits in said land.*

Appendix at A-54-55 (emphasis added).

1968 Amendment of the Northern Cheyenne Allotment Act

Between 1926 and the mid-1960s, the tribal development of reservation minerals—which Congress had envisioned in the 1926 Act[6]—had not occurred. However, this situation

5. During the 1940s the Tribe commenced a program of reacquiring allotments. As a result of this program, 62 per cent of the surface of the Reservation is in tribal ownership. It is not clear whether in these acquisitions the Tribe acquired as well the allottees' expectancies in the minerals beneath the acquired allotments. The remainder of the Reservation surface is owned almost entirely by tribal allottees.

changed in the late 1960s when it became apparent that the Northern Cheyenne Tribe might, for the first time, actually be in a position to develop its mineral resources. These circumstances led to the enactment of the 1968 Amendment.

In adopting this amendment, Congress concluded that it would be inimical to the best interests of the Northern Cheyenne Tribe to carry through with the plan of transferring the minerals to the allottees, their heirs or devisees in 1976.[7] Accordingly, section 3 of the 1926 Act was amended to read as follows:

> Sec. 3(a) The coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved in perpetuity for the benefit of the tribe and may be leased with the consent of the Indian council for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a-f), under such rules, regulations, and conditions as the Secretary of the Interior may prescribe.

6. To this end, the 1926 Act authorized leasing of the minerals with the consent of the Tribal Council, and provided that all income therefrom would be held in trust to be expended for the benefit of the Tribe. As stated by the House sponsor of the 1926 Act upon its passage:

> This is a very important bill to the Indians, because it not only provides an allotment of 160 acres to each member of the tribe, but it also preserves tribal grazing and timber lands for the benefit of the entire tribe, and offers a means for the development of any mineral resources, such as oil, which may be discovered on the reservation, for the benefit of the tribe. In other words, it finally and fully confirms the title of the tribe in such a way as to develop their homes and give the Indians the fullest possible benefit of their natural resources. . . .

67 CONG. REC. 9886 (1926).

7. "If the mineral resources are reserved to the tribe in perpetuity, the income can be used for the benefit of all tribal members. If the minerals are allowed to become the property of the individual allottees, some persons will benefit greatly, and others will not benefit at all, depending upon where the minerals happen to be found." H.R. REP. No. 1292, 90th Cong., 2d Sess. 2 (1968); S. REP. No. 1145, 90th Cong., 2d Sess. 2 (1968).

(b) The unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians.

Act of July 24, 1968, 82 Stat. 424. Appendix at A-44-45. In addition, Congress inserted the litigation provision which gave rise to this suit.

Decisions Below

Invoking jurisdiction based upon this litigation provision, the Northern Cheyenne Tribe commenced suit in the United States District Court for the District of Montana against the above-mentioned class of allottees, their hiers or devisees. The district court ruled that Congress did have the power to amend the 1926 Act, concluding that this enactment bestowed upon defendants no vested property right in the minerals which is protected by the Fifth Amendment; see Appendix at A-36-37. On appeal, the Ninth Circuit Court of Appeals reversed. Relying on inapplicable rules of construction and on a misinterpretation of *Choate v. Trapp*, 224 U.S. 665 (1912), the court concluded that Congress lacked power to amend the Act; see Appendix at A-33-34.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Declared Unconstitutional an Act of Congress Which Resolves a Conflict Between National Energy Policy and the Federal Trust Responsibility to Indians. The Result Endangers the Survival of the Northern Cheyenne People.

A serious dilemma arose in the late 1960s due to the vast untapped coal reserve on the Northern Cheyenne Reservation. National energy needs projected the Northern Cheyenne people, who like their coal had long been ignored, into the American energy arena. Major energy companies,

including the Peabody, Amax, and Consolidation coal companies began pursuing rights to mine that coal. Inevitable conflicts followed.

On the one hand, rising national energy demands, new coal conversion techniques, and the superior economics of strip mining over deep mining created intense interest in western coal reserves. Moreover, the low sulphur content of western coal made it especially attractive in light of increasingly stringent air pollution standards, which traditional eastern coal could not meet.

Prime among these western coal deposits is the immense Northern Cheyenne reserve. Totaling approximately 5.2 billion tons, it spans the entire Reservation.[8] Unusually great bed thicknesses, low overburdens, and gently rolling terrain render this coal ideal for strip mining.[9] The result: Northern Cheyenne coal has been projected into a position of national significance with an economic value of no less than two billion dollars.[10]

On the other hand, it became clear to the Cheyennes and to responsible government officials, that while coal development on the Reservation might lift the people out of intense poverty, it might also result in destruction of the

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8. United States Bureau of Mines Study, *Mineral Resources and Their Potential on Indian Lands, Northern Cheyenne Reservation, Big Horn and Rosebud Counties*, at 23 (unpublished).

9. The Montana Bureau of Mines and Geology estimates that one 13,560 acre section of the Reservation averages 88,500 recoverable tons per acre. *Northern Cheyenne Planning Study*, Department of Intergovernmental Relations, Division of Planning and Economic Development, State of Montana (1973) at 10.

10. This is a conservative estimate based on a recent offer by Shell Oil Company to the Crow Indian Tribe for coal located beneath the Crow Reservation, which adjoins the Northern Cheyenne Reservation on the west. *Billings Gazette*, July 9, 1975, at page 1.

Northern Cheyenne culture. This culture is a product of a unique history. No other tribe, except perhaps the Sioux, more fiercely resisted the white man's march into the Great Plains.[11] The Northern Cheyennes, with the Sioux, defeated Custer at the Little Bighorn in 1876, and responded to their subsequent banishment to Oklahoma with a defiant trek back to Montana to reclaim their homeland which is now the Reservation. Believing them singularly unqualified for the "civilizing" benefits of allotment, Congress waited until 1926 before it enacted an allotment plan for the Northern Cheyennes. Furthermore, Congress gave them the most limited of allotment acts, and did not provide for the opening of the Reservation to white settlement.[12]

The Reservation today remains almost entirely within Indian ownership.[13] Traditional grazing, farming, and timbering activities remain the predominant land uses. The absence of industrial development has left fully intact the grassy high plains and rolling hills. The Reservation population is overwhelmingly Indian; approximately 3,000 of some 3,600 enrolled Northern Cheyennes live on the Reservation.[14] The Northern Cheyennes have retained the integrity of their Indian culture; the Cheyenne language is

11. R. Andrist, *The Long Death–The Last Days of the Plains Indians* 70 (1964).

12. By contrast, sale of unallotted lands to whites was a key element of the allotment acts given other allotted reservations in Montana. Crow: Act of June 4, 1920, 41 Stat. 751; Blackfeet: Act of March 1, 1907, 34 Stat. 1015, 1035; Fort Peck: Act of May 30, 1908, 35 Stat. 558; Flathead: Act of April 23, 1904, 33 Stat. 302.

13. Approximately 62 per cent of the land is tribally owned; the remainder is almost exclusively owned by tribal allottees. See note 5, *supra*. This stands in marked distinction against the other allotted Indian reservations of Montana.

14. *Northern Cheyenne Planning Study*, note 9, *supra*, at 45.

widely spoken, and traditional customs and rituals are practiced. In summary, the Northern Cheyenne Reservation remains today what it has been from it inception: a homeland for a distinct Indian people and culture.

Strip mining would affect every aspect of Reservation life and every member of the Reservation community. It would raise fundamental questions about the continued viability of the Reservation as a homeland. Consequently, decisions concerning development require a deep sense of awareness of *all* competing benefits and costs. The United States Congress has concluded that only the Northern Cheyenne People *as a whole* should make such decisions. Pursuant to its trust responsibility, Congress implemented this determination by enacting the 1968 Amendment which maintains in the Tribe as a whole decisionmaking power over the entire coal deposit.[15]

The decision of the court below, however, annulled that congressional determination on constitutional grounds. The result will be chaotic decisionmaking with regard to 53 per cent of the coal reserve, and, potentially, a disastrous land rush reminiscent of those which devastated the oil-rich Indian reservations of Oklahoma. Decisions regarding devel-

15. Secretary of Interior Rogers C. B. Morton held similarly in a decision on a Tribal petition concerning coal development on the Reservation presented directly to him in January, 1974. After extensive personal deliberation, Secretary Morton held:

> As trustee I take cognizance of my responsibility to preserve the environment and culture of the Northern Cheyenne Tribe and will not subvert these interests to anyone's desires to develop the natural resources on that Reservation.
>
> . . . . Furthermore, the Tribe and the coal companies may be assured that the terms and conditions upon which mineral development may proceed on the Northern Cheyenne Reservation will require their joint agreement and support prior to any further approval by me.

Written decision of Secretary of Interior Rogers C. B. Morton, dated June 4, 1974, on petition of Northern Cheyenne Tribe concerning coal development on the Reservation.

opment of that portion of the reserve will be made simply on the basis of the economic self-interests of the individual members of the respondent class,[16] without regard to the general welfare of the Tribe as a whole. Moreover, since each allotment is multiply owned, each member of the class will control only a fractional interest in the minerals under his own allotment. Therefore, he will be vulnerable to unscrupulous land speculators who historically have descended upon newly allotted reservations to exploit the distributed lands and resources.[17] In 1934[18] Congress acted to end permanently the allotment system because of the massive Indian land losses produced by this system.[19] It would be tragically ironic if that scenario were reenacted on the Northern Cheyenne Reservation in 1976 because of a future allotment provision enacted in 1926, only eight years prior to Congress' closing of the allotment chapter of American Indian history.

These dangers have resulted directly from the Ninth Circuit's decision striking down the 1968 Amendment on constitutional grounds. That drastic judicial action merits the review of this Court.

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16. This is a disparate group consisting primarily of tribal members, but also including a substantial number of non-member Indians and whites. Many of these people live far from the Reservation, and have no immediate interest in the general welfare of the residents of the Reservation.

17. Cohen, *Handbook of Federal Indian Law* (1941) at 215-217. In fact, promptly after the court below entered its decision, such persons appeared on the scene to "assist" the allottees in marketing their coal interests. One approach suggested the formation of a society "to assist members with money matters so that they and their heirs will receive monthly checks for 100 years or more."

18. Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§461-462.

19. Hearings on H.R. 7902 before the Committee on Indian Affairs, 73d Cong., 2d Sess. 15-18 (1934).

2. This Case is a Product of Congress' Uncertainty About the Nature of Its Power Over Indian Lands Rooted in a Misunderstanding of a Fifth Amendment Decision of this Court

After concluding that its *duty* as guardian of the Northern Cheyenne people required that ownership and control of the coal deposit remain wholly with the Tribe, Congress became concerned that it lacked the *power* to implement that conclusion. Accordingly, Congress made the effectiveness of the 1968 Amendment expressly contingent upon a judicial determination that such power existed.[20]

This congressional uncertainty was rooted in a misunderstanding of *Choate v. Trapp*, 224 U.S. 665 (1912). The court below fell victim to that misunderstanding. As a result, Congress now stands erroneously advised as to the nature and extent of its power. Thus, grave consequences exist regarding the future exercise of the congressional trust responsibility over allotted reservations. It is imperative, therefore, that certiorari be granted—so that Congress may be correctly and definitively advised on this issue.

3. Based on a Misconstruction of this Court's Holding in *Choate v. Trapp*, the Court Below Drew Erroneous Conclusions About the Extent to Which Congressional Power over Indian Lands is Limited by the Fifth Amendment.

The court below held that *Choate v. Trapp*, 224 U.S. 665 (1912) insulated the allottee's expectancy in the minerals from congressional power. *Choate v. Trapp*, however,

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20. The district court ruled on September 30, 1971 that this case presents a justiciable case and controversy within the meaning of Article III, Section 2 of the United States Constitution. This ruling was not appealed.

is a very limited holding and is in no way dispositive of the issues in the case at hand. The *Choate* holding is founded upon the existence of a contract, the Atoka Agreement, made between the Dawes Commission[21] and the Choctaws and the Chickasaws in 1897. Under the agreement, each tribal member was to receive an allotment which was to be nontaxable for a limited period of time. As consideration for the allotment, each tribal member consented to the allotment of all tribal lands and relinquished his interest in virtually all tribal property. However, before the period of nontaxability had run, Congress repealed the tax exemption. The Court held that the owners of the nontaxable land possessed a vested right to the tax exemption which Congress had no power to remove without compensation. The existence of the Atoka Agreement, and, the Indian relinquishment of all rights to tribal land as consideration for the nontaxable land are referred to throughout the opinion. As the Court stated at 672:

> There was here, then, an offer of nontaxable land. Acceptance by the party to whom the offer was made, with the consequent relinquishment of all claim to other lands furnished a part of the consideration, if, indeed, any was needed, in such case, to support either the grant or the exemption.

Subsequent cases have confirmed that the *Choate* decision *only* protects rights arising from contract. In *Gritts v. Fisher*, 224 U.S. 640 (1912), decided on the same day as *Choate*, the Court rejected the Fifth Amendment argument

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21. The Dawes Commission was a body constituted by Congress and authorized to negotiate with the Five Civilized Tribes (which included the Choctaws and the Chickasaws) for the purpose of extinguishing tribal title to reservation lands, by means of either allotment or cession of title to the United States. Act of March 3, 1893, 27 Stat. 612, 645.

that a 1902 statute had created vested rights in allottees—on the ground that such an argument "treats the Act of 1902 as a contract, when it is only an act of Congress and can have no greater effect." 224 U.S. at 648. The Court was even more emphatic in *Brader v. James*, 246 U.S. 88 (1918):

> The plaintiff in error relies upon *Choate v. Trapp*, 224 U.S. 665, in which this Court sustained a contractual exemption as to taxation of certain Indian lands. In that case, the right of exemption was based upon a valid and binding contract. . . .

246 U.S. at 97.

Similarly, in *Sweet v. Schock*, 245 U.S. 192 (1917), this Court stated:

> In *[Choate v. Trapp]* it was decided that an Indian of one of the Five Civilized Tribes had an equitable interest in tribal lands which when given up constituted a consideration for his allotment and its exemption from taxation. . . .

245 U.S. at 196. And *see Carpenter v. Shaw*, 280 U.S. 363, 367 (1929); *County of Mahnomen v. United States*, 319 U.S. 474, 476, 480.

A second point must be made about the narrow scope of the *Choate* rule: it protects only *consummated* allotments. As stated in the *Choate* opinion:

> Upon delivery of the patent the agreement was executed, and the Indian was thereby vested with all the right conveyed by the patent. . . .

224 U.S. at 672. The significance of this aspect of *Choate* was later confirmed in *Sizemore v. Brady*, 235 U.S. 441 (1914), another case dealing with the Fifth Amendment and Indian property rights:

> [T]he power of Congress was not exhausted or re-

> strained by the adoption of the original agreement, but remained the same thereafter as before, save that rights created by *carrying the agreement into effect* could not be divested or impaired. *Choate v. Trapp*, 224 U.S. 665, 671.

235 U.S. at 450 (emphasis added). Since the patents delivered under the Northern Cheyenne Allotment Act did not convey the minerals to the allottees—and, to the contrary, explicitly reserved them for the tribe—*Choate v. Trapp*, is not dispositive of the issues in the case at hand.[22]

The Ninth Circuit's misinterpretation of *Choate v. Trapp*, is a serious error which exacerbates the problem of congressional uncertainty as to its power over Indian lands; to eliminate this damaging uncertainty, the Ninth Circuit's error should be corrected by this Court.

4. The Decision Below Conflicts With Decisions of This Court Which Hold That Congress Retains Continuing Power to Alter a Statutory Plan for the Distribution of Tribal Property to Tribal Members.

This Court in *United States v. Jim*, 409 U.S. 80 (1972), considered whether Congress had the power, consistent with the Fifth Amendment, to alter a 1933 statutory plan which distributed specified tribal assets to a distinct community within a tribe. This plan provided that royalties from minerals beneath the Anteh Extension, a remote area annexed to the Navajo Reservation, accrue solely to the benefit of the Anteh Extention Community. However, in 1968, Congress amended the plan "to spread the benefit of the royalties more broadly among the Navajo community."

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22. In addition, *Choate v. Trapp* is inapplicable to the issues of this case since *Choate* was in no way concerned with the power of Congress to reallocate a benefit held in trust as between the tribe and the individual allottees. *See* Reason 4, *infra*.

409 U.S. at 81. The district court declared the amendment violative of the vested property rights of the members of the Anteh Extension community. This Court reversed per curiam on the following basis:

> Congress in 1933 did not create constitutionally protected property rights in the appellees. . . . To be sure, the 1933 Act established a pattern of distribution which benefited the appellees more than other Indians on the Navajo reservation. *But it was well within the power of Congress to alter that distributional scheme.*

409 U.S. at 82 (emphasis added) (footnote omitted).

The *Jim* decision relied primarily on *Gritts v. Fisher*, 224 U.S. 640 (1912). *Gritts* involved the Cherokee allotment act which provided for an initial allotment of tribal lands and a future distribution, to the original allottees, of all remaining lands and tribal treasury funds. However, in 1906, prior to the contemplated future distribution, Congress amended the act to significantly expand the class of persons eligible for that final distribution. The original allottees' claim that the amendment unconstitutionally impaired a vested property right in that final distribution was denied as follows:

> But it is said that the Act of 1902 contemplated that [the original allottees] alone should receive allotments and be the participants in the distribution of the remaining lands, and also of the funds, of the tribe. No doubt such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting duly born members of the tribe to the allotment and distribution. The difficulty with appellants' contention is that it keeps the Act of 1902 as a contract, when "it is only an act of Congress and can have no greater effect." *Cherokee Intermarriage Cases*, 203 U.S. 76, 93. *It was . . . subject to*

change by Congress at any time before it was carried into effect and while the tribal relations continued.

224 U.S. at 648 (emphasis added).

Under this principle, numerous sorts of amendments to distributional plans have been sustained by this Court:

a. Amendments extinguishing the right to receive an allotment:

Chase, Jr. v. United States, 256 U.S. 1 (1921); *United States v. Rowell*, 243 U.S. 464 (1917); *Sizemore v. Brady*, 235 U.S. 441 (1914); *Lowe v. Fisher*, 223 U.S. 95 (1912); *Wallace v. Adams*, 204 U.S. 415 (1907); *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899).

b. Amendments diminishing the value of prospective benefits:

United States v. Jim, supra; Gritts v. Fisher, supra.

c. Amendment encumbering a prospective allotment: *Nadeau v. Union Pacific R.R.*, 253 U.S. 442 (1920).

d. Amendment divesting the tax immunity of the allotment:

Sweet v. Schock, 245 U.S. 192 (1917); and

e. Amendments extending, reimposing, or removing restrictions on alienability of the allotment:

United States v. Jackson, 280 U.S. 183 (1930); *Brader v. James*, 246 U.S. 88 (1918); *Williams v. Johnson*, 239 U.S. 414 (1915); *United States v. Bartlett*, 235 U.S. 72 (1914); *Goat v. United States*, 224 U.S. 458 (1912); *Heckman v. United States*, 224 U.S. 413 (1912); *Tiger v. Western Investment Company*, 221 U.S. 286 (1911).

The decision of the court below holding that the 1968 amendment divested the allottees of a vested property right cannot be reconciled with the decisions of the Court cited above.

5. The Decision of the Court Below Conflicts with Decisions of this Court Which Establish that Congress Need Not Reserve Specifically Its Inherent Power to Amend a Statutory Plan for Allotment.

The court below held that in order for Congress to preserve its power to amend the 1926 Act, "a clear expression of Congress' retained power" must be included in the Act.[23] No cases were cited for that proposition. Moreover, the court's holding was in conflict with decisions of this Court which establish that no reservation of power whatsoever is necessary.

Congress possesses plenary power to adjust enacted schemes for the allocation of tribal property as "might become necessary or appropriate in view of changing conditions, the welfare of the Indians and the public interests." *United States v. Chase*, 245 U.S. 89, 100 (1917). And *see United States v. Jackson*, 280 U.S. 183 (1930); *Chase, Jr. v. United States*, 256 U.S. 1 (1921); *Brader v. James*, 246 U.S. 88 (1918); *Sweet v. Schock*, 245 U.S. 192 (1917);

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23. The court below reasoned that in three other allotment acts, the Fork Belknap, Crow and Osage allotment acts, it was expressly stated that Congress retained the power to alter the allottee's expectancy in the minerals beneath his allotment. From this observation, the Court made the following presumption: "The rather conspicuous ommission of such language from a statute dealing with the same subject as (those other allotment acts) indicates that Congress intended to create rights in the Northern Cheyenne allottee different from those in the other allotment statutes." Appendix at A-6-7.

However, careful analysis of these other allotment acts reveals: 1) they are generically different from the 1926 Act—vastly more pervasive in their dismantlement of the system of tribal property and far more liberal in their relinquishment of the trust stewardship over tribal members and their allotments; 2) examinations of the legislative histories of the Crow and Osage acts reveal that the express provisos were not viewed by Congress as essential to the preservation of the inherent power to alter the allottee's expectancy in the minerals; and, 3) neither the Fort Belknap, Crow nor Osage acts contain the all-encompassing statements of reserved power found in sections 1 and 3 of the Northern Cheyenne act.

United States v. Rowell, 243 U.S. 464 (1917). This power is fundamental, inherent in Congress' role as guardian of Indian people, and not subject to relinquishment so long as that guardianship subsists. *United States v. Jackson*, *supra* at 190. That Congress need not specifically reserve an amendatory power in its statutory plans for the distribution of tribal property is clear from the following decisions of this Court. In each of them, an alteration of a statutory plan of distribution is sustained despite the lack of a specific reservation of a power to alter. *United States v. Jim*, 409 U.S. 80 (1972); *United States v. Jackson, supra; Brader v. James, supra; Sweet v. Schock, supra; Sizemore v. Brady*, 235 U.S. 441 (1914); *United States v. Bartlett*, 235 U.S. 72 (1914); *Gritts v. Fisher*, 224 U.S. 640 (1912); *Goat v. United States*, 224 U.S. 458 (1912); *Heckman v. United States*, 224 U.S. 413 (1912); *Lowe v. Fisher*, 223 U.S. 95 (1912); *Tiger v. Western Investment Company*, 221 U.S. 286 (1911); *Wallace v. Adams*, 204 U.S. 415 (1907).

Gritts v. Fisher is a particularly compelling case. In *Gritts*, children born after September 1, 1902 were expressly barred from a class of allottees, yet this Court sustained a 1906 amendment which expanded the class to include those previously-excluded children. Similarly, in a 1972 decision, *United States v. Jim, supra*, the language of an original allotment act strongly indicated that lands were to be permanently preserved for the benefit of the originally-specified class of allottees. Nevertheless, this Court upheld an amendment which significantly broadened this class of allottees.

6. The Decision Below Conflicts with Decisions of this Court Which Hold That an Allottee Does Not Acquire Vested Rights Until the Allotment is Actually Conveyed.

The expectancy involved in this case arose from the following language in the 1926 Act:

> [A]t the expiration of fifty years from the date of approval of this Act the coal or other minerals, including oil, gas, and other natural deposits of said allotments shall *become* the property of the respective allottees or their heirs. . . .

Appendix at A-40 (emphasis added).[24] The trust patents delivered pursuant to the act provided:

> There is also reserved for the benefit of the Northern Cheyenne Indians, all the coal or other minerals, including oil, gas, and all natural deposits in said land.

Appendix at A-55. Manifestly, neither the Act nor the patent makes a present grant of the minerals; and, under the decisions of this Court, absent a present statutory grant or a completed allotment, no rights vest. *Nadeau v. Union Pacific R.R.*, 253 U.S. 442 (1920); *Mullen v. Pickens*, 250 U.S. 590 (1919); *United States v. Rowell*, 243 U.S. 464 (1917); *Woodward v. DeGraffenried*, 238 U.S. 284 (1915); *Sizemore v. Brady*, 235 U.S. 441 (1914).

For example, in *United States v. Rowell, supra*, Congress commanded allotment of a specifically-identified tract to a tribal member in the following terms:

That the Secretary of Interior is hereby authorized

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24. The court below reasoned: ". . . Congress by its unconditional, noncontingent grant of these deposits to the allottees, evidenced an intent to create rights to the minerals in their favor. Under the Fifth Amendment, these rights, belonging to the individual allottees incident to their ownership of the allotted lands, could not be divested absent compliance with due process of law or payment of compensation." Appendix at A-5.

and directed to issue a patent in fee for [that tract]. . . .

243 U.S. at 465. Prior to the issuance of the patent, Congress discovered that the tract was far more valuable than originally believed and thus repealed the allotment act. This Court held that no vested property rights were invaded, on the following analysis: 1) the terms of the act did not in themselves amount to a grant "*in praeasenti*" which passed title immediately;[25] and moreover, 2) the repeal occurred prior to delivery to the allottee of a patent conveying the lands:

> And if, before that direction [to issue a patent] was complied with, it was discovered that the [land's] situation and value were such that to allot or convey it to him would invest him with much more than a fair distributive share of the common property of the tribe, we think it was equally admissible for Congress to recall that direction in the interests of the tribe as a whole. At most that direction was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect.

243 U.S. at 468. *See also Levey v. Stockslager, Commissioner*, 129 U.S. 470 (1889).

Similarly, in *Sizemore v. Brady, supra*, persons entitled to allotment under the terms of an original allotment act asserted that subsequent amendment of that act which divested their expectancy was in violation of the Fifth Amendment. This Court denied that claim on the basis

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25. Certainly under this standard, the provision in the 1926 Act calling for a future transfer of the minerals could not be considered a grant *in praeasenti*. Moreover, while the act in *Rowell* "directed" allotment, the 1926 Act merely "authorized" allotment.

that the amendment was enacted before actual allotment was consummated:

> There was nothing in the [original allotment act] indicative of a purpose to make a grant *in praeasenti*. On the contrary it contemplated that various preliminary acts were to precede any investiture of individual rights. The lands and funds to which it related were tribal property and only as it was carried into effect were individual claims to be fastened upon them. Unless and until that was done Congress possessed plenary power to deal with them as tribal property. . . . In short, the power of Congress was not exhausted or restrained by the adoption of the original agreement, but remained the same thereafter as before, save that rights created by carrying the agreement into effect could not be divested or impaired. *Choate v. Trapp*, 224 U.S. 665, 671.

235 U.S. at 449.

7. The Decision Below Conflicts With Decisions of This Court Concerning Rules of Construction for Indian Legislation.

a. *The Decision Below Applied the Rule of Construction Which Seeks the Indian Understanding—Yet This Rule Was Inapplicable.*

The court below clearly conceded that under the 1926 Northern Cheyenne allotment act "it is technically correct that the reservation to the tribe severs the minerals from the allotted lands, making them part of the unallotted tribal property, and thereby confers upon Congress the power to change the beneficiaries of such tribal lands." Appendix at A-7 (footnote omitted). This conclusion is, in fact, mandated by this Court's decision in *British-American Oil Producing Co. v. Board of Equalization*, 229 U.S. 159 (1936). In that case this Court construed a statute which authorized the Secretary of the Interior to allot lands on the Blackfeet Reservation but provided that minerals were

to be reserved to the tribe until Congress should provide otherwise. The Court held in part:

> The issue of the trust patents containing, as the statute requires, a reservation for the benefit of the tribe of all minerals, including oil and gas, in or under the allotted land, operates to carve out of such land and create a distinct estate consisting of the minerals. This estate is in itself land, and, being reserved for the benefit of the tribe, it is tribal land, and is unallotted.

299 U.S. at 164-65.

Despite this holding, the court below rejected the literal terms of the 1926 Act on the basis of the constructional rule that Indian treaties and legislation "are to be taken in accord with common understanding, not in their technical sense, but in the sense that an illiterate people would understand them." Appendix at A-7. In light of this constructional rule, the Ninth Circuit presumed from the terms of the 1926 Act alone that the Northern Cheyenne allottees in 1926 must have understood the allotment act as endowing them with a fixed right to minerals 50 years hence. Explicitly, the court held that "[i]t is this meaning of the statute that creates a right to minerals in favor of the allottees." Appendix at A-8.

However, the decisions of this Court establish that the above rule of construction is *not* to be indiscriminately applied to any situation involving Indians; it is *only* applicable to those congressional actions which involve *Indian consent*. For example, in *United States v. First National Bank*, 234 U.S. 245 (1914), the rule of construction which seeks the Indian understanding was held inapplicable to the interpretation of an Indian act which did not involve Indian consent:

> [T]he Government insists that to effect the legislative

> purpose the words must be interpreted as the Indians understood them, and cases from this court (*Jones v. Meehan*, 175 U.S. 1; *Starr v. Long Jim*, 227 U.S. 613) are cited to the effect that Indian treaties and acts to which the Indians must give consent before they become operative must be interpreted so as to conform to the understanding of the Indians as to the meaning of the terms used. The justice and propriety of this method of interpretation is obvious and essential to the protection of an unlettered race, dealing with those of better education and skill, themselves framing contracts which the Indians are induced to sign. But the legislation here in question is not in the nature of contract and contains no provision that makes it effectual only upon the consent of the Indians whose rights and privileges are to be affected.

234 U.S. at 259.

Thus, while the rule of construction which seeks the Indian understanding has been frequently applied by this Court to statutes based upon Indian consent[26] there is *no* basis for applying this constructional rule to the Northern Cheyenne Allotment Act—since this Act was not explicitly predicated upon the consent of the Northern Cheyennes[27].

b. *The Decision Below Misapplied the Rule of Construction That Statutes Enacted for the Benefit of Indians Are to Be Construed in Their Favor.*

The court below held that in construing the 1926 Act, all doubts should be resolved by favoring the allottees over the tribe. In support of this proposition, the Ninth Circuit

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26. *See, e.g., Carpenter v. Shaw*, 280 363 (1940); *Marlin v. Lewallen*, 276 U.S. 68 (1928); *Starr v. Long Jim*, 221 U.S. 613 (1913); and, *Choate v. Trapp, supra.*

27. The court below invoked the Indian understanding rule of construction on the basis of *Adams v. Osage Tribe of Indians*, 59 F.2d 653 (10th Cir. 1932) *cert. denied*, 287 U.S. 652. However, the legislative history of the allotment act involved in *Adams* discloses that this act, *unlike* the Northern Cheyenne allotment act, was predicated upon prior tribal approval. H.R. REP. NO. 4996, 59th Cong., 1st Sess. 4 (1906).

cited decisions of this Court[28] which dealt with state and federal attempts to tax allotments acquired by treaty or agreement. Within that particular context, this Court has held that the terms of applicable treaties, agreements, or statutes must be liberally construed in favor of the allottees[29].

However, it is improper to hold that the decisions above require that the allottees be preferred over the tribe in the case at hand. Unlike that line of cases relied upon by the Ninth Circuit, this case does not involve an attempt by a non-Indian party, the government, to profit from encroachment upon individual Indian property rights. Rather, it involves a conflict between two groups both of which contain Indians[30]. Therefore, since it is not possible to favor either side under the rule (without disfavoring the other), the rule is inapplicable. To employ this rule of construction as did the Ninth Circuit defies logic and is indefensible.

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28. *Squire v. Capoeman*, 351 U.S. 1 (1956); *Carpenter v. Shaw, supra; Choate v. Trapp, supra.*

29. The court below attempted to fit the case at hand into that line of decisions with the following artificial reasoning: "Nominally the dispute in this case is between the tribe on one side and the class of allottees, heirs, and devisees on the other. But the actual controversy involves not these parties, but appellants, some of whom are Indians, having rights to the minerals beneath their lands, and Congress which by the 1968 Act seeks to extinguish these claimed rights." Appendix at A-8, note 5.

30. However, the respondent class of allottees, heirs and devisees includes a substantial number of non-member Indians and whites. Accordingly, if any rule of preference is to be applied, it should be "the settled rule that as between the whites and the Indians the laws are to be construed most favorably to the latter." *Cherokee Intermarriage Cases*, 203 U.S. 76, 94 (1906).

c. *The Decision Below Failed To—Yet Should Have—Applied the Rule of Construction Which Broadly Considers the Circumstances Surrounding the Enactment of Indian Legislation.*

The 1926 Northern Cheyenne allotment act was enacted at the request of the Northern Cheyenne people for their collective benefit. In determining the congressional intent behind this legislation, the court below should have considered the circumstances and needs of these Indian people and their object and expectations in soliciting this act. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). An inquiry into these considerations culminates with a most significant fact.

While established in 1884 and enlarged in 1900, the Northern Cheyenne Reservation received little congressional attention during the late 19th and early 20th centuries. While many other tribes during these years were objects of individualized congressional scrutiny and legislation (especially dealing with allotment), the Northern Cheyenne were essentially ignored by Congress.

However, by 1924 the Northern Cheyenne people had become painfully aware that they had not yet been granted an allotment act. Thus, in October of 1924 the tribe began a course of correspondence and discussion with members of the Montana congressional delegation in hopes of procuring an act of allotment. By December of 1924, Senator Thomas J. Walsh of Montana had learned that the Commissioner of Indian Affairs Charles H. Burke opposed the allotment of the Northern Cheyenne Reservation. In response, Walsh urged the tribe to provide him with materials which could be used to overcome Commissioner Burke's opposition.

This request brought forth an overwhelming response from the Northern Cheyenne people, an emphatic declaration of their hopes and expectations regarding allotment. A letter dated February 3, 1925, signed by tribal Chiefs and Headsman was sent to Senator Walsh. This letter began:

> We transmit herewith a petition signed by all the people belonging to this reservation that we were able to see in the short time allowed. In fact, we encountered no opposition whatever, and they were all in hearty accord with the allotment idea.

Appendix at A-49.

The petition to Walsh, in relevant part, read:

> We, the undersigned members of the Northern Cheyenne Indian Tribe of the State of Montana, do hereby humbly beseech you to do all in your power to have a Bill introduced and passed in Congress, to have an allotment of not less than 320 acres of tillable farm land made to each and every member of the Northern Cheyenne Indians.
>
> *To reserve all mineral, timber, and coal lands for the benefit of the Northern Cheyenne Indian Tribe, said tribe to have absolute control of same.*

Appendix at A-53 (emphasis added).

Attached to the petition were 37 pages bearing the signatures, marks, and thumbprints of approximately 500 tribal members. Thus, in view of this petition, there can be no doubt that the Northern Cheyenne people desired that the ownership and control of all reservation minerals be retained by the tribe.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

ZIONTZ, PIRTLE, MORISSET,
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By STEVEN H. CHESTNUT
Attorneys for Petitioner

APPENDIX A

OPINIONS BELOW

Ninth Circuit Court of Appeals Opinion
(Reported at 505 F.2d 268)

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,

v.

NORTHERN CHEYENNE DEFENDANT CLASS OF ALLOTTEES, HEIRS AND DEVISEES,
Defendant-Appellant.

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,

v.

ELVA L. LITTLECHIEF WILLIAMSON AND JAMES BOWEN,
Defendants-Appellants.

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,

v.

MYRON L. LITTLEBIRD,
Appellant.

Nos. 73-1545 to 73-1547

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

Oct. 17, 1974

Before WRIGHT and CHOY, Circuit Judges, and PALMIERI,* District Judge.

CHOY, Circuit Judge:

The Northern Cheyenne Tribe, at the direction of

*The Honorable Edmund L. Palmieri, Sr. United States District Judge for the Southern District of New York, sitting by designation.

Congress, brought this action in the district court under a special grant of jurisdiction against appellants, individual owners, and class representatives of all allottees, their heirs and devisees, owning allotments of land within the tribal reservation. At stake are the rights to the mineral deposits contained in and beneath these lands. In 1968, Congress reserved these deposits in perpetuity for the benefit of the tribe, provided the tribe instituted this suit "to determine whether under the provisions of the Act of June 3, 1926 [44 Stat. 690], as amended, the allottees, their heirs or devisees, have received a vested property right in the minerals which is protected by the fifth amendment." Act of July 24, 1968, 82 Stat. 424, 425. The district court held that no vested property rights were received and awarded judgment for the tribe, 349 F.Supp. 1302 (D.Mont. 1972). This appeal followed. We reverse.

The Act of June 3, 1926 as Amended

Pursuant to its then existing policy under the General Allotment Act of 1887, 24 Stat. 388, of ending the Indians' communal land holdings and substituting therefor the private ownership of the reservation lands, Congress in 1926 ordered the allotment of specific tracts of land in the Northern Cheyenne reservation in Montana. In the first section of the Northern Cheyenne Allotment Act (the Act), Congress declared the reservation lands to be the property of the Northern Cheyenne Indians, "subject to such control and management of said property as the Congress of the United States may direct." 44 Stat. at 690. Section 2 authorized the Secretary of the Interior to prepare a complete roll of these Indians along with a list of lands suitable for agriculture

and grazing. A tract not exceeding 160 acres of such land was then to be alloted in severalty to each of the duly enrolled Indians for whom the reservation was set apart, and a trust patent issued for this land. Classified as a homestead of the individual allottee, the land was to be held in trust for him by the United States, and was to remain inalienable and nontaxable for a period of twenty-five years from the issuance of the patent, or until the death of the allottee.

In the part of the Act which is most critical here, Congress reserved the land's timber and mineral deposits for the benefit of the tribe for a period of years. Section 3 states:

> "That the timber, coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved for the benefit of the tribe and may be leased with the consent of the Indian council under such rules and regulations as the Secretary of the Interior may prescribe: *Provided,* That the expiration of fifty years from the date of the approval of this Act the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall become the property of the respective allottees or their heirs: *Provided further,* That the unalloted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians." 44 Stat. at 691.

After several other changes in the Act,[1] on July 24,

1. Under the Act of July 24, 1947, the timber on the allotted land was declared to be the property of the allottees. 61 Stat. 418. In 1961, Act of September 22, 1961, 75 Stat. 586, the Act was amended so that at the expiration of the fifty year period the minerals "shall become the property of the respective allottees or their heirs or devisees, subject to any outstanding leases, regardless of any prior conveyance by such allottee, heirs, or devisees of the land overyling such minerals, oil, gas, or other natural deposits . . ." Further, title to the minerals was to be "held by the United States in trust for the Indian owners, except that if by the expiration of said fifty years the entire Indian interests in the minerals

1968, Congress enacted P.L. 90-424, 82 Stat. 424, which amended Section 3 of the Act to read as follows:

> "(a) The coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved in perpetuity for the benefit of the tribe and may be leased with the consent of the Indian council for mining purposes . . . under such rules, regulations, and conditions as the Secretary of the Interior may prescribe.
>
> (b) The unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians."

Thus, as a result of the 1968 amendment, the mineral deposits which under the Act were to become the allottees' property in 1976, were instead declared to be the property of the tribe in perpetuity. The question presented is whether the allottees received rights to the minerals through the Act which are constitutionally protected against impairment by the 1968 amendment. The answer to this question in turn depends upon the intent of Congress in 1926 when it reserved the minerals for fifty years, but provided that thereafter they would become the property of the allottees.

The district court held that Congress had reserved to itself sufficient powers (1) to preclude any vesting of rights in the allottees and (2) to preserve its right to extend in perpetuity the trust period of the mineral estate.

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within any allotment or parcel thereof is granted by this Act to a person or persons who at that time hold an unrestricted title to the lands overlying such minerals, oil, gas, or other natural deposits, then the Secretary of the Interior shall by fee patent transfer to such person or persons the unrestricted fee simple title to such minerals, oil, gas, or other natural deposits, which title shall vest in such person or persons as of the date of the patent."

The court reasoned that the allottees received no rights in the minerals when Congress reserved them for the tribe; that this reservation severed them from the allotted lands, creating two separate estates, one surface and one mineral, with only the surface estate passing to the allottees, while the minerals became part of the unallotted tribal lands. Since Congress, in section 3 of the Act, had explicitly reserved the power to manage and control such unallotted land, the court concluded that the reallocation of the minerals to the tribe was but a valid exercise of this power. In addition, the court found that Congress's more broadly stated power in section 1, of management and control over the reservation lands, indicated that it intended to retain its plenary authority over the mineral rights. Finally, the court concluded that the language in section 3, referring to the minerals which "shall become the property of the individual allottees," when compared with other language stating that the land "is hereby, declared to be the property" of the allottees, showed that Congress created only an inchoate or prospective right to the minerals, rather than a present vested one. 349 F.Supp. at 1308-1309.

We believe the district court erred when it considered the mineral deposits as unallotted tribal land subject to reappropriation, when Congress, by its unconditional, noncontingent grant of these deposits to the allottees, evidenced an intent to create rights to the minerals in their favor. Under the Fifth Amendment, these rights, belonging to the individual allottees incident to their ownership of the allotted lands, could not be divested absent compliance with due process of law or payment of compensation.

Reserving Mineral Deposits

It had been Congress's policy in several other allotment statutes, where the lands contained potentially valuable mineral resources, to allot the surface estate while reserving for the tribe for a period of years the minerals beneath these lands. *E.g.*, Act of March 3, 1921, 41 Stat. 1355 (Fort Belknap Indians); Act of June 4, 1920, 41 Stat. 751 (Crow Indians); Act of June 28, 1906, 34 Stat. 539 (Osage Indians). In each of these prior acts, however, the future interest of the allottees at the expiration of the term fixed was clearly made contingent upon Congress not acting to the contrary.[2] Thus, where Congress had retained the power to extend the period of the Osage Indians' tribal ownership, it has been held that the allottees could not prevent this extension based on a claim that they had received vested rights to those minerals. Adams v. Osage Tribe of Indians, 59 F.2d 653 (10th Cir. 1932); *see* Taylor v. Tayrien, 51 F.2d 884 (10th Cir. 1931).

The 1926 Act on the other hand contains no language qualifying or conditioning the allottees' remainder interest in the mineral deposits. The rather conspicious omission of such language from a statute dealing with the same subject as the previous legislation, indicates that

2. The mineral deposits in the allotted lands of the Fort Belknap Indians were reserved for the tribe for fifty years, thereafter to become the property of the individual allottee or his heir, "but the right [was] reserved to Congress to extend the period within which such reserved tribal rights shall expire." 41 Stat. at 1359. The reservation for the Crow Indian tribe similarly provided that "unless otherwise ordered by Congress" these mineral deposits "shall become the property of the individual allottee or his heirs . . ." 41 Stat. at 753. And, in the case of the Osage Indians, the future mineral rights were awarded to the allottees "unless otherwise provided for by Act of Congress." 34 Stat. at 542; see also Act of June 30, 1919, 41 Stat. 3, 17, where the mineral deposits were "reserved for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct. . . ."

Congress intended to create rights in the Northern Cheyenne allottees different from those in the other allotment statutes.

Although we reach the opposite result here from that in *Adams, supra,* the rationales for both cases are entirely consistent. In construing the language of the Osage Allotment Act, 34 Stat. 539, as amended, the court in *Adams* followed the

> "established rule that treaties and legislative acts that deal with Indians and their affairs are to be taken in accord with common understanding, not in their technical sense, but in the sense that an illiterate people would understand them."

59 F.2d at 654. The court found that language "simple and plain, and its meaning clear to common understanding." *Id.* at 655. The provision granting the minerals "unless otherwise provided for by Act of Congress" clearly reserves in Congress the power to alter, extend or otherwise modify the allottees' interest.

There is no such clear expression of Congress's retained power in this case. While it is technically correct that the reservation to the tribe severs the minerals from the allotted lands, making them part of the unallotted tribal property,[3] and thereby confers upon Congress the power

3. British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159, 164-165, 57 S.Ct. 132, 81 L.Ed. 95 (1936). In this case, the Court held that Congress may consent to state taxation levied on the production of oil under tribal lands. The statute involved was that reserving the mineral deposits on the Blackfeet Indian reservation (see note 2 *supra*), Act of June 30, 1919, 41 Stat. 3, 16, 17, for the tribe "until Congress shall otherwise direct." Thus, the case concerned only tribal rights in the mineral deposits. To the extent that the Court determined that a mineral reservation severs this estate and makes it unallotted land, we believe that the facts here, which pertain to individual property rights, are distinguishable and we therefore are not bound by this language.

to change the beneficiaries of such tribal lands,[4] the ultimate result of such analysis would be Congress' achieving through the back door what it had never specifically claimed when it went through the front. Viewing the reservation for the tribe not in this technical sense but in the way the Indians would understand it, the minerals were never declared to be a part of the unallotted lands. In the plain words of the statute, the minerals were simply reserved, or set aside, for the benefit of the tribe for a fixed term of fifty years, thereafter to become the property of the allottees, with no conditions attached to their receipt of these minerals. It is this meaning of the statute that creates a right to the minerals in favor of the allottees. Under *Adams* it should be controlling. Where either of two interpretations of the language used by Congress is possible, one having a technical meaning and the other as naturally understood by the Indians, the natural meaning of the words must prevail, since statutes passed for the benefit of the Indians are to be liberally construed and all doubts are to be resolved in their favor.[5] Squire v. Capoeman, 351 U.S. 1, 6-7, 76 S.Ct. 611, 100 L.Ed. 883 (1956); Carpenter v. Shaw, 280 U.S. 363, 367, 50 S.Ct. 121, 74 L.Ed. 478 (1930); Choate v. Trapp, 224

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4. *See* United States v. Jim, 409 U.S. 80, 93 S.Ct. 261, 34 L.Ed.2d 282 (1972).

5. Nominally the dispute in this case is between the tribe on one side and the class of allottees, heirs and devisees on the other. But the actual controversy involves not these parties, but appellants, some of whom are Indians, claiming rights in the minerals beneath their lands, and Congress which by the 1968 Act seeks to extinguish these claimed rights. As the district court stated: "If the [appellants] lose what they claim they are entitled to under the Northern Cheyenne Allotment Act it will be because Congress has so directed. If they prevail, it will be because that direction was beyond Congress' congressional power to impose." 349 F.Supp. at 1307 n. 17.

U.S. 665, 675, 32 S.Ct. 565, 56 L.Ed. 941 (1912); Stevens v. C. I. R., 452 F.2d 741, 744 (9th Cir. 1971); Arenas v. Preston, 181 F.2d 62, 66 (9th Cir. 1950).

The Allottees' Rights in Allotted—Versus Unallotted—Lands

The power reserved by Congress in section 1 of the 1926 Act, over the reservation lands, cannot be the basis for any extinguishment of the allottees' rights in their allotted lands. "Reservation land is divided into two classes: land allotted to individual Indians for the use and benefit of the allottee; and common tribal land used for the benefit of the entire community. . . ." C. I. R. v. Walker, 326 F.2d 261, 262 (9th Cir. 1964). There is a broad distinction between such tribal property held in common and the private property held by the individual allottee. Choate v. Trapp, *supra*, 224 U.S. at 671, 32 S.Ct. 565. *See* United States v. Oklahoma Gas & Electric Co., 127 F.2d 349, 353-354 (10th Cir. 1942).

It is undoubted that as regards tribal property Congress maintains plenary authority to make such changes in the management and disposition thereof as it deems necessary in order to promote the welfare of the Indians. Morrison v. Work, 266 U.S. 481, 485, 45 S.Ct. 149, 69 L.Ed. 394 (1925); Gritts v. Fisher, 224 U.S. 640, 648, 32 S.Ct. 580, 56 L.Ed. 928 (1912); *see* United States v. Jim, 409 U.S. 80, 93 S.Ct. 261, 34 L.Ed.2d 282 (1972). And, so long as the land remains tribal in character the individual Indian has no vested right, as against the tribe, to any specific part of the tribal property. Gritts v. Fisher, *supra*, St. Marie v. United States, 108 F.2d 876 (9th Cir. 1940).

See generally, F. Cohen, Handbook of Federal Indian Law 183 (1940).

Once the reservation land is allotted, in severalty and a trust patent issued, however, though legal title is retained by the United States, the allottee acquires an equitable interest in the property, which except for the restriction on alienation, gives him the virtual fee in the land. United States v. Paine Lumber Co., 206 U.S. 467, 473, 27 S.Ct. 697, 51 L.Ed. 1139 (1907); Arenas v. Preston, *supra,* 181 F.2d at 64; United States v. Minnesota, 113 F.2d 770, 773 (8th Cir. 1940); Eastman v. United States, 28 F.Supp. 807, 808 (W.D.Wash. 1939). The Supreme Court considered the nature of the allottees' interest in Choate v. Trapp, *supra,* where Congress had allotted lands to the Choctaw and Chickasaw Indians. The lands were declared to be non-taxable for a period of twenty-five years. Some ten years later, Congress enacted further legislation which permitted state taxation of these unrestricted lands. The Court held

> "[T]he provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma. . . .
>
> ". . . Under the provisions of the 5th Amendment there was no more power to deprive [the allottee] of the exemption than of any other right in the property. No statute would have been valid which reduced his fee to a life estate, or attempted to take from him 10 acres, or 50 acres, or the timber growing on the land.
>
> After he accepted the patent the Indian could not be heard, either at law or in equity, to assert any claim to the common property. If he is bound, so is the tribe and the government when the patent was issued." 224 U.S. at 673-674, 32 S.Ct. at 569.

Similarly, here, the Northern Cheyenne Indians received a vested right to the minerals incident to their allotments. Congress was without power subsequently to divest them of that right. That Congress realized it may have exceeded even its own plenary power to deal with tribal property (United States v. Jim, et al, *supra*) in enacting the amendment of July 28, 1968, here in issue (p. 269, *supra*) is evidenced by the unusual nature of the enactment itself. The 1968 amendment to the 1926 Allotment Act, attempting to reserve the mineral deposits to the tribe in perpetuity, is wholly provisional, and explicitly leaves the validity of the enactment entirely up to the court.[6]

The judgment permitting such divestiture is reversed and remanded to the district court for further proceedings consistent with this opinion.

Reversed and remanded.

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6. The statute reads in pertinent part: If the court determines that the allottees, their heirs or devisees, have received a vested interest in the minerals which is protected by the fifth amendment, or if the tribe does not commence an action as here authorized within two years from the date of this Act, the first section of this Act shall cease to have any force or effect, and the provisions of section 3 of the Act of June 3, 1926, as amended by the Acts of July 24, 1947, and September 22, 1961, shall thereupon be carried out as fully as if section 3 had not been amended by this Act. Act of July 24, 1968, 82 Stat. 424, 425.

District Court Opinion (Reported at 349 F.Supp 1302)

THE NORTHERN CHEYENNE TRIBE,
Plaintiff,

v.

WILLIAM HOLLOWBREAST *et al.*,
Defendants.

Civ. No. 883

UNITED STATES DISTRICT COURT,
D. MONTANA, BILLINGS DIVISION

Sept. 29, 1972

Rehearing Denied Nov. 28, 1972

ORDER AND OPINION

JAMESON, District Judge.

This is a class action brought pursuant to Public Law 90-424, approved July 24, 1968 (82 Stat. 424), which amended section 3 of the Act of June 3, 1926 (44 Stat. 690), as amended by the Acts of July 24, 1947 (61 Stat. 418) and September 22, 1961 (75 Stat. 586), to reserve in perpetuity the minerals underlying the Northern Cheyenne reservation for the benefit of the plaintiff Tribe.

Under prior acts the minerals would have become the property of the allottees, their heirs and devisees, in 1976, Section 3 of the Act of June 3, 1926 providing:

> "Sec. 3. That the timber, coal, or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved for the benefit of the tribe and may be leased with the consent of the Indian council under such rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That at the expiration of fifty years from the date of the approval of this Act the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall become the property of the respective allottees or their heirs: *Provided further*, That the unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians." 44 Stat. 690, 691.

Public Law 90-424 amends Section 3 of the Act of June 3, 1926, as amended, to read:

> "Sec. 3. (a) The coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved in perpetuity for the benefit of the tribe and may be leased with the consent of the Indian council for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a-f), under such rules, regulations, and conditions as the Secretary of the Interior may prescribe.
>
> "(b) The unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians." 82 Stat. 244, 425.

The Northern Cheyenne Tribe was authorized by Section 2 of Public Law 90-424 to commence this action "against the allottees who received allotments pursuant to the Act of June 3, 1926, as amended, their heirs or devisees, either individually or as a class, to determine whether under the provisions of the Act of June 3, 1926, as amended, the allottees, their heirs or devisees, have received a vested property right in the minerals which is protected by the fifth amendment."[1]

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1. This section provided further that the United States District Court for the District of Montana shall have jurisdiction to hear and determine the action, with a right of appeal, and that if the court determines that the allottees, their heirs and devisees have a vested interest in the minerals protected by the fifth amendment, or if the Tribe does not commence an action within two years, the provisions of section 3 of the Act of June 3, 1926, as amended, shall "be carried out as fully as if section 3 had not been amended by this Act."

Pursuant to this Act and Rule 23, F.R.Civ.P.[2] the Northern Cheyenne Tribe[3] commenced this action on July 2, 1970, within two years of the effective date of the Act, against ten named defendants,[4] individually and as representatives of all allottees, their heirs or devisees who received allotments pursuant to the Act of June 3, 1926, as amended,[5] seeking judgment that the allottees do not have a vested right in the minerals underlying the reservation and that the minerals are reserved in perpetuity for the benefit of the Tribe.

Ten of the named defendants are members of the plaintiff Tribe[6] and are represented by Messrs. Brueggemann and Porter, who also represent nine additional defendants who are members of the Tribe. Another member of the Tribe who was not a named defendant is represented by the United States Attorney for the District of Montana. Two of the named defendants are not members of the Tribe. One of these defendants, Elva L. Littlechief Wil-

2. While the complaint does not specifically allege that it is brought pursuant to Rule 23, it does contain allegations clearly designed to bring it within that rule.

3. The Tribe is a federal corporation chartered under the Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378).

4. By amended complaint filed September 8, 1970 two additional persons were named as defendants, both individually and as representatives of heirs and devisees who are nonmembers of the Northern Cheyenne Tribe.

5. It is alleged, *inter alia*, that the allottees, their heirs and devisees number 1,489 persons located in various places throughout the United States and are so numerous as to make it impracticable to bring them all before the court; that there are questions of law or fact which are common to the entire class; and that the named defendants will fairly and adequately protect the interests of the class.

6. The ten reside in various parts of the Northern Cheyenne Reservation. Two were named from each of the five political districts for electoral purposes.

liamson, is represented by the Montana Legal Services and its Big Horn and Rosebud County branch, who also represent James Bowen.[7]

Numerous motions and briefs have been filed by counsel for the respective parties, as set out more fully in memorandum opinions of September 30, 1971, and January 12, 1972. All motions were denied in orders entered September 30, 1971 and January 10, 1972.

In the memorandum opinion of September 30, 1971 it was held that (1) this court has jurisdiction; (2) the United States is not an indispensable party defendant; (3) the United States should not be joined as an involuntary party plaintiff; and (4) this is a proper class action. In the January 12, 1972 opinion it was held further that (5) the notice served upon the defendants was sufficient; (6) no further notice or questionnaire was required; and (7) all defendants, both members and nonmembers of the Northern Cheyenne Tribe who would be affected by the judgment in this case, are adequately represented by counsel.[8]

The court adheres to all of these conclusions.[9]

7. Williamson is an enrolled member of the Eastern Shawnee Indian Tribe. The other named defendant who is not a member of the plaintiff Tribe, Delores Walters Murdock, is a member of the Crow Tribe. Bowen is a non-Indian who inherited from an allottee.

8. It was recognized that in a class action the interests of the representative parties must be typical of those of the entire class; the action must be vigorously prosecuted by the representative parties and their counsel; counsel must be competent to conduct the litigation; and it is necessary to eliminate as far as possible the likelihood that the litigants are involved in a collusive suit or that the representative parties have interests antagonistic to those of the remainder of the class or subclass. See Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562-563 (2 Cir. 1968).

9. All of these questions were discussed fully in the opinions of September 30, 1971 and January 12, 1972.

In a pretrial order entered July 10, 1972 the parties agreed to submit the following legal issues for determination prior to trial:[10]

> "1. Whether or not the defendants and their predecessors in interest received a vested property right in the minerals in and under their respective allotments which is protected by the Fifth Amendment of the United States Constitution by virtue of the Act of June 3, 1926 (44 Stat. 690) as amended;
>
> "2. Whether or not the defendant class is entitled to the revenues received by the plaintiff by virtue of the execution of leases and permits covering the minerals in and under their respective allotments;[11]
>
> "3. Whether or not the plaintiff is liable to the defendants for damages done to the surface of their respective allotments by the permittees and lessees of the plaintiff in exploring for mineral deposits in and under said allotments;[12]
>
> "4. Whether or not the defendants are entitled to an injunction to enjoin the plaintiff and its permittees and lessees from going upon their respective allotments for the purpose of exploring for mineral deposits."

Acquisition of Reservation Lands

The lands comprising the Northern Cheyenne Reservation were originally part of the Crow country recog-

10. It was stipulated that this submission was made without waiver by the defendants of any of the defenses asserted in pre-trial motions or waiver by plaintiff of its right to contest the jurisdiction of the court over the counterclaims of the defendants.

11. The parties have stipulated that the plaintiff in the past has entered into oil and gas leases, coal permits and coal leases and has received sums of money therefor, the exact amount of which is not presently available to the parties.

12. The parties have stipulated further that the plaintiff's lessees and permittees have explored for mineral deposits and in the exploratory operations have distrubed the surface of the ground and have removed certain samples of the soil and mineral deposits; that there has been no production of oil and gas or coal from the lands.

nized by the Treaty of September 17, 1851, 11 Stat. 749. 2 Kappler, Indian Affairs, Laws and Treaties, 594. When the Crow Reservation was created by the Treaty of May 7, 1868, 15 Stat. 649, the "Crow Nation ceded all its right and title in other lands embraced within the treaty area to the United States." United States v. Northern Pacific Ry. Co., 311 U.S. 317, 354, 61 S.Ct. 264, 281, 85 L.Ed. 210 (1940). The United States thereupon became the owner of these lands.

The Northern Cheyenne Reservation was created by an executive order issued by President Arthur on November 26, 1884 which directed that the land be "withheld from sale and settlement, and set apart for the use and occupation of the Northern Cheyenne Indians, ° ° ° and such other Indians as the Secretary of the Interior may see fit to locate thereon ° ° °." 1 Kappler, *supra*, 860. The boundaries of the reservation were enlarged by an executive order of President McKinley on March 19, 1900, the tract of land therein described being "withdrawn from sale and settlment and set apart as a reservation for the permanent use and occupation of the Indians now occupying or belonging upon the Northern Cheyenne Reservation, ° ° °." 1 Kappler, *supar*, 860.[13]

Act of June 3, 1926

The executive order of March 19, 1900 was confirmed

13. I find no merit in defendants' contention that the Northern Cheyenne Indians acquired a vested interest in these lands under the Northern Cheyenne and Northern Arapaho Treaty of May 10, 1868, 15 Stat. 655. While the Northern Cheyenne Indians agreed to accept land to be set apart as a permanent reservation and relinquished their rights to all other lands, the reservation lands now occupied by the Northern Cheyenne Tribe were not described in that treaty and the members of the Tribe acquired no vested interest under that treaty in either the surface or minerals.

by Congress June 3, 1926 in the enactment of the Northern Cheyenne Allotment Act (44 Stat. 690). Section 1 declares the lands "to be the property of [the Northern Cheyenne] Indians, subject to such control and management of said property as the Congress of the United States may direct." Section 2 provides for the allotment of agricultural and grazing lands not exceeding 160 acres to each of the duly enrolled Indians "now living, for whom said reservation was set apart. * * *."

Section 3 provides that the timber, coal or other minerals "are hereby reserved for the benefit of the tribe and may be leased with the consent of the Indian council under such rules and regulations as the Secretary of the Interior may prescribe." This is followed by two provisions critical to a determination of this case: (1) that at the expiration of fifty years the coal or other minerals "shall become the property of the respective allottees or their heirs," and (2) that the unalloted lands "shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians."

Congressional Policies Re: Indian Lands

The question of whether under these provisions of the Act of June 3, 1926, as amended,[14] the allottees, their

14. Act of June 3, 1926 (44 Stat. 690), as amended by the Act of July 24, 1947 (61 Stat. 418), and the Act of September 22, 1961 (75 Stat. 586). Under the 1947 amendment timber was "hereby declared to be the property of the allottees." The 1961 amendment provided that upon the expiration of the fifty year period the minerals "shall become the property of the respective allottees or their heirs or devisees, subject to any outstanding leases, regardless of any prior conveyance by such allottee, heirs, or devisees of the land overlying such minerals, oil, gas, or other natural deposits * * *." The Amendment provided further that

heirs or devisees, "have received a vested property right protected by the fifth amendment" must be considered in the light of well established national policies with respect to Indians and Indian property.

a. Plenary Power of Congress

[1] First, it is clear that Congress has plenary power to deal with Indian affairs and property.[15] It is true, as defendants contend, that the "power to control and manage" is not absolute. The United States, may not, for example, give tribal lands to others or appropriate them for its own purposes without just compensation.[16] Here, however, we are not concerned with the taking of Indian property for others, but with a controversy between the Tribe and members and nonmembers of the Tribe who own allotted lands. This controversy must be resolved by determining the intent of Congress in the Act of June 3, 1926 and the

title to the minerals was to be "held by the United States in trust for the Indian owners, except that if upon the expiration of said fifty years the entire Indian interests in the minerals within any allotment or parcel thereof is granted by this Act to a person or persons who at that time hold an unrestricted title to the lands overlying such minerals, oil, gas, or other natural deposits, then the Secretary of the Interior shall by fee patent transfer to such person or persons the unrestricted fee simple title to such minerals, oil, gas, or other natural deposits, which title shall vest in such person or persons as of the date of the patent."

15. U.S. Const., Art. I, § 8, cl. 3; Worcester v. State of Georgia, 31 U.S. 515, 561 (6 Pet. 515), 8 L.Ed. 483 (1832); United States v. Kagama, 118 U.S. 375, 385, 6 S.Ct. 1109, 30 L.Ed. 228 (1885); Perrin v. United States, 232 U.S. 478, 486, 34 S.Ct. 387, 58 L.Ed. 691 (1914); Department of Interior, Federal Indian Law, 21, 38 (Cohen 1958 Rev.).

16. United States v. Alcea Band of Tillimooks, 329 U.S. 40, 54, 67 S.Ct. 167, 91 L.Ed. 29 (1946), citing Stephens v. Cherokee Nation, 174 U.S. 445, 478, 19 S.Ct. 722, 43 L.Ed. 1041 (1899); and United States v. Creek Nation, 295 U.S. 103, 110, 55 S.Ct. 681, 79 L.Ed. 1331 (1935). See also United States v. Shoshone Tribe, 304 U.S. 111, 115, 58 S. Ct. 794, 82 L.Ed. 1213 (1938).

power of Congress in the Act of July 14, 1968.[17]

In dealing with "tribal property subject to the control of the United States as guardian of Indians, Congress may make such changes in the management and disposition as it deems necessary to promote their welfare."[18] In determining "what is reasonably essential to the protection of the Indians, Congress is invested with a wide discretion, and its action, unless purely arbitrary, must be accepted . . . by the courts."[19]

b. Reservation of Mineral Estates

Second, it had been the policy of Congress for several years prior to the enactment of the Northern Cheyenne Allotment Act in 1926 to sever mineral estates from surface estates on many Indian reservations, the severed, but undivided and unallotted, mineral estates being held in trust for the tribe for a term of years. This policy was usually expressed, as here, by the Allotment Acts "reserving" the minerals for the benefit of the tribe for a term of years and a provision that at the expiration of the term the minerals would "become the property" of the allottees

17. As stated in the Memorandum Opinion of September 30, 1971, at 10: "Here, the United States has a duty to hold and protect the mineral rights in question. The sole issue is whether it is to hold them for the plaintiff tribe or the defendant allottees, their heirs and devisees. If the defendants lose what they claim they are entitled to under the Northern Cheyenne Allotment Act it will be because Congress has so directed. If they prevail, it will be because that direction was beyond Congress's constitutional power to impose."

18. Morrison v. Work, 266 U.S. 481, 485, 45 S.Ct. 149, 151, 69 L.Ed. 394 (1925): See also Gritts v. Fisher, 224, U.S. 640, 642, 32 S.Ct. 580, 56 L.Ed. 928 (1912); Department of Interior, Federal Indian Law, *supra*, at 34.

19. Perrin v. United States, *supra*, note 15 at 486, 34 S.Ct. at 390. See also United States v. Thomas, 151 U.S. 577, 585, 14 S.Ct. 426, 38 L.Ed. 276 (1894).

of the lands.[20] In some cases Congress subsequently acted to extend the term the mineral estate was to be held in trust for the tribe.[21]

The power of Congress to extend a period of reservation of mineral rights was recognized in Adams v. Osage Tribe of Indians, 59 F.2d 653, 657 (10 Cir. 1932) cert. denied 287 U.S. 652, 53 S.Ct. 116, 77 L.Ed. 563, the case upon which plaintiff places primary reliance. There the Court held that statutes enacted in 1921 and 1929[22] extending a twenty-five year period of reservation of mineral rights in the Osage Tribe under the Act of June 28, 1906 (34 Stat. 539) were within the power of Congress and not violative of due process. It recognized that the reservation was sufficient to divide allotments into two estates, surface and mineral, and held that the allottees did not take vested etsates in remainder in the minerals on issuance of deeds to their allotment of the surface. The Court concluded: "And so we say the reservation in the Allotment Act and the Acts of March 3, 1921, and March 2, 1929, were 'but an exertion of the administrative control of the government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it

20. For example, Act of June 28, 1906, § 3 (34 Stat. 539) (Osage Indian Reservation, 25 year reservation); Act of June 30, 1919, § 10 (41 Stat. 3, 17) (Blackfeet Indian Reservation, "until Congress shall otherwise direct" reservation); Act of June 4, 1920, § 6 (41 Stat. 751) (Crow Indian Reservation, 50 year reservation); Act of March 3, 1921, §§ 4 and 6 (41 Stat. 1355) (Fort Belknap Reservation, 50 year reservation). See generally, Department of Interior, Federal Indian Law, *supra*, at 649-652.

21. For example, Act of June 28, 1906 (34 Stat. 539), as amended by the Act of March 3, 1921 (41 Stat. 1249), and the Act of March 2, 1929 (45 Stat. 1478) (Osage Indians).

22. Act of March 3, 1921 (41 Stat. 1249) and Act of March 2, 1929 (45 Stat. 1478).

was carried into effect and while the tribal relations continued.'" 59 F.2d at 657, quoting Gritts v. Fisher, *supra*, note 18, 224 U.S. at 648, 32 S. Ct. 580, 583.[23]

Contentions of the Parties

Recognizing the wide discretion of Congress in exercising it plenary power over Indian lands and the general policy of reserving minerals, the defendants contend that Adams v. Osage Tribe of Indians, *supra*, is distinguishable and that the Act of June 3, 1926, unlike other and comparable acts, contains no express reservation of power in Congress to modify, extend or extinguish the interest of the surface allottees in the mineral estate. They argue that Congress manifested a clear intent in the 1926 Act to vest title to the minerals, and was powerless to change or modify that vested interest in 1968.

On the other hand, plaintiff argues that while the Act of June 3, 1926 does not contain the precise language of the Osage and other reservations, it does contain a comparable, and perhaps wider, reserved power in Congress.

Is Adams v. Osage Tribe of Indians Distinguishable?

The Osage Allotment Act of June 28, 1906, Section 2,

23. See also Taylor v. Tayrien, 51 F.2d 884, 887 (10 Cir. 1931) cert. denied 284 U.S. 672, 52 S.Ct. 127, 76 L.Ed. 569, where the court held that the Osage Act of 1906 "made no allotment of the mineral estate in the land; it remained tribal property." The court said further at 890: 'The idea in reserving the minerals to the tribe was doubtless a double one; it tended to equalize the allotments to the individuals, and it preserved intact a source to which the Indian who had squandered his allotment, might look for sustenance. In 1906 it was thought that the Osages would be ready for complete emancipation by 1931; as that year drew near, it was seen that he was not yet ready to hold his own; the period has been twice extended for his protection."

Paragraph 7, (34 Stat. 539), *inter alia*, granted allotments in surface land and provided:

> "That the oil, gas, coal, and other minerals upon said allotted lands shall become the property of the individual owner of said lands at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress."

Further, the Act provided at Section 3:

> "That the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage Tribe for a period of twenty-five years ° ° °."

And at Section 5:

> "That at the expiration of the period of twenty-five years ° ° ° the lands, mineral interests, and moneys, herein provided for and held in trust by the United States shall be the absolute property of the individual members of the Osage Tribe ° ° ° or their heirs, as herein provided ° ° °."

The Northern Cheyenne Allotment Act of June 3, 1926 does not include the phrase "unless otherwise provided by Congress" following the reservation of the mineral estate to the Tribe. Section 1 of the Act does provide, however, that the Northern Cheyenne Reservation "is hereby, declared to be the property of said (Northern Cheyenne) Indians, subject to such control and management of said property as the Congress of the United States may direct."[24] Since the reserved mineral estate is a part of the reservation land, it is also subject to this reserved power of Congress to manage and control, negating a congressional intent to vest mineral rights in individual allottees.

24. This express and broad reservation of power over all reservation land in the first section of the Northern Cheyenne Allotment Act is absent in other Allotment Acts cited *supra*.

Section 3 of the June 3, 1926 Act provides for the leasing of minerals during the fifty year trust period, that the minerals shall become the property of the individual allottees upon the expiration of the fifty year trust period, and that "the unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians." A mineral estate "is in itself land, and, being reserved for the benefit of the tribe, it is tribal land, and is unallotted." British-American Oil Producing Co. v. Board of Equalization of State of Montana, 299 U.S. 159, 164-165, 57 S. Ct. 132, 134, 81 L.Ed. 95 (1936).[25] Thus, Congress' reserved power to manage and control unallotted land precluded any vesting of rights in the allottees, and preserved the power to extend in perpetuity the trust period of the mineral estate.

I conclude that by reason of the general provision in Section 1 of the Act of June 3, 1926 that the property of the Northern Cheyenne Reservation is "subject to such control and management" as Congress may direct, reinforced by a similar provision in Section 3, Adams v. Osage Tribe of Indians, *supra*, is indistinguishable and should be followed here.

No Vested Mineral Interest Granted to Surface Allottees

In addition to the reserved power in Congress, the language of the Act of June 3, 1926 also indicates that no present mineral interest was granted to the surface allottees. The Act provides that the minerals shall "become"

25. See also United States v. Bruisedhead, 248 F.Supp. 999, 1001 (D. Mont. 1966).

the property of the allottees "at the expiration of fifty years."

In contrast, when Congress acted in Section 1 to convey a present interest to the Tribe it provided that the Northern Cheyenne Reservation "is hereby, declared to be the property" of the Northern Cheyenne Indians. And again, by amendment in the Act of July 24, 1947, (61 Stat. 418) Congress provided that timber on surface allotments is "hereby declared to be the property of the allottees * * *."

The court in finding no vested mineral rights in the Osage allottees characterized their interest as an "inchoate right" to receive a share of the net returns, "subject to the will of Congress." Taylor v. Tayrien, *supra*, at 887. See also Adams v. Osage Tribe of Indians, *supra*. Cohen describes an individual's right in tribal property as a "prospective right"[26] and defines it as "an intangible right to share" in tribal property. Department of Interior, Federal Indian Law, *supra*, at 748.

I conclude that, consistent with Congressional policy and comparable allotment acts reserving minerals to a tribe, the Northern Cheyenne Allotment Act of June 3, 1926 also reserves sufficient power in the Congress to reserve the Northern Cheyenne mineral estate "in perpetuity

26. Defendants argue that the interest of the allottees, their heirs and devisees, is "equivalent to a future interest, presently vesting." Plaintiff terms the interest a "mere expectancy." Because of the unique guardian/ward relationship between the United States and Indians, and the trust character of tribal property, use of standard property descriptions—mere expectancy, future interest, remainders, conditions precedent and subsequent—are of little assistance.

for the benefit of the tribe",[27] and that the allottees, their heirs and devisees, received no "vested property right in the minerals which is protected by the fifth amendment." The reserved mineral estate is unallotted tribal land subject to the control and management of Congress under Sections 1 and 3 of the Northern Cheyenne Allotment Act of June 3, 1926 (44 Stat. 690), as amended.[28]

This conclusion in effect disposes of the remaining issues of law submitted for determination prior to trial. No useful purpose would be served by a detailed discussion of these issue.[29]

Clearly, if the defendants acquired no vested interest in the minerals under the Act of June 3, 1926, as amended, they acquired no right to the revenues received by the plaintiff by virtue of the execution of leases and permits

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27. It is unnecessary to determine the exact nature or character of the Tribe's interest in the reserved mineral estate. See Department of Interior, Federal Indian Law, *supra*, at 583.

28. This conclusion is strengthened by the language in the patents issued to individual allottees. All trust patents issued pursuant to both the original Act of June 3, 1926 and the subsequent amendments, alloting lands as homesteads, "subject to all the provisions, conditions, limitations, and restrictions contained in (the) Act of June 3, 1926", contain this express reservation: "There is also reserved, for the benefit of the Northern Cheyenne Indians, all the coal or other minerals, including oil, gas and all natural deposits in said land." At least part of the fee patents contain this reservation: "There is reserved for the benefit of the Northern Cheyenne Indians, all the coal or other minerals, including oil, gas and all natural deposits in said land, in accordance with the provisions of the Act of June 3, 1926 (44 Stat. 690)."
Clearly the trust patents provide no basis for any allottee's reliance on a present vested interest or even the promise of a future interest in the minerals. While the statute rather than the form of patent is controlling, the patent does manifest an interpretation of the statute by the Department of the Interior consistent with the conclusions herein stated.

29. They were fully considered in the memorandum opinion of September 30, 1971 in denying motions for a temporary restraining order and preliminary injunction.

covering the minerals under their respective surface allotments. Even if they had acquired a vested interest in the minerals, under the clear provisions of the 1926 Act, as amended, they would not be entitled to the proceeds from any lease or sale prior to the expiration of the fifty year period.

Section 4 of the Act of June 3, 1926 expressly provides that "all the income of said tribe from rents, royalties, or other profits accruing from the sale of any * * * coal, or other minerals, including oil, gas, and other natural deposits herein reserved for the benefit of the said Indians, * * * shall be deposited in the Treasury of the United States to the credit of the Northern Cheyenne Indians and be subject to expenditure for their benefit in such manner as Congress may direct." The plain meaning of this language establishes an intent on the part of Congress that all proceeds from the lease or sale of mineral rights inure to the collective benefit of the Northern Cheyenne Indians during the fifty year period.[30]

Defendants also seek damages and an injunction prohibiting exploration, drilling and development of the minerals on surface allotments. The owners of a mineral estate or its lessee can enter and use the surface for exploration, recovery and development of the minerals, as is reasonably necessary. Hurley v. N. P. Ry. Co., 153 Mont. 199, 202, 455 P.2d 321 (1969). Defendant is entitled to

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30. At the date of the enactment of the Allotment Act the Northern Cheyenne Tribe was not a legal entity distinct from its members. As noted *supra*, note 3, subsequently the Tribe was incorporated under the Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378). Some persons who were not members of the Tribe became entitled to alloted lands through descent and distribution. The revised language contained in the 1961 amendment to section 3 reflects these changes.

neither damages nor an injunction for the activities of the Tribe and its lessees in exploring, drilling, and developing their mineral estate.[31]

Counsel for all parties have submitted comprehensive and well prepared briefs, which have been very helpful to the court

Pursuant to Rule 14(b) of the local rules of court, plaintiff will prepare and file a draft of judgment in accordance with this opinion and serve a copy upon each other party.

On Motions for New Trial or to Amend Judgment

Counsel for all of the named defendants have filed motions for a new trial or to amend the judgment. Prior to entry of September 29, 1972, the court considered all of the statutes, treaties, executive orders, and cases cited in support of the motions and ruled against defendants' contentions.

Nothing has been presented to persuade the court to modify its conclusions. On the contrary, the court finds support in the per curiam opinion of the United States Supreme Court in United States v. Jim, and Utah v. Jim, ... U.S. ....., 93 S.Ct. 261, 34 L.Ed.2d 282, decided November 20, 1972. The Court held that a 1933 statute

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31. Any disturbance of the surface has resulted from exploratory operations. There has been no production from any of the lands. See note 12, *supra*. In its brief filed July 14, 1972 plaintiff recognizes the right of the surface estate, saying in part: "While it is quite clear that the plaintiff, its permittees and licensees, are entitled to go upon for the purpose of exploration, the plaintiff does not assert that its permittees and licensees have a right to go on and strip mine, which would in essence destroy the surface estate of the defendants. The plaintiff recognizes that its licensees or permittees have no right to destroy the surface estate without compensating the individual defendants."

(47 Stat. 1418) conferring oil and gas royalties on Indians residing on the Anteh extension of the Navajo Reservation "did not create constitutionally protected property rights" in the beneficiaries of the Act and upheld a 1968 Act (82 Stat. 121) enlarging he class of beneficiaries to include the entire Navajo tribe residing in San Juan County, Utah.

Defendants Williamson and Bowen, noting the similarity between the 1933 statutory grant to the residents of the Anteh extension and the 1926 Act upon which the defendants here rely, urged this court to follow the opinion of the Utah District Court (unreported) holding that the 1933 Act vested property rights in the Anteh extension residents and that the 1968 Act was unconstitutional.

The Supreme Court reversed. following Gritts v. Fisher, 224 U.S. 640, 32 S.Ct. 580, 56 L.Ed. 928 (1912), the Court concluded:

> "Congress has not deprived the Navajo of the benefits of mineral deposits on their tribal lands. It has merely chosen to re-allocate the ° ° ° royalties ° ° ° in a more efficient and equitable manner. This was well within the power of Congress to do. As no 'property,' in a Fifth Amendment sense, was conferred upon residents of the Anteh extension by the 1933 Act, no violation of the Fifth Amendment was effected by the 1968 legislation."

The motions for a new trial or to amend the judgment are denied.

APPENDIX B

JUDGMENTS AND ORDERS BELOW

Ninth Circuit Court of Appeals Order Denying Petition for Rehearing—Entered April 28, 1975

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-1545

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,
v.
NORTHERN CHEYENNE DEFENDANT CLASS OF ALLOTTEES, HEIRS AND DEVISEES,
Defendant-Appellant.

No. 73-1547

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,
v.
ELVA L. LITTLECHIEF WILLIAMSON AND JAMES BOWEN,
Defendants-Appellants.

No. 73-1546

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,
v.
MYRON L. LITTLEBIRD,
Defendant-Appellant.

ORDER

Before: WRIGHT and CHOY, Circuit Judges, and PALMIERI,* District Judge.

The panel as constituted in the above cases has voted to deny the petition for rehearing. The petition for rehearing is denied.

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*The Honorable Edmund L. Palmieri, Sr. United States District Judge for the Southern District of New York, sitting by designation.

Ninth Circuit Court of Appeals Order Granting Leave to File Petition for Rehearing—Entered February 28, 1975

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-1545

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,
v.
NORTHERN CHEYENNE DEFENDANT CLASS OF ALLOTTEES, HEIRS AND DEVISEES,
Defendant-Appellant.

No. 73-1546

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,
v.
ELVA L. LITTLECHIEF WILLIAMSON AND JAMES BOWEN,
Defendants-Appellants.

No. 73-1547

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,
v.
MYRON L. LITTLEBIRD,
Defendant-Appellant.

ORDER

Before: WRIGHT and CHOY, Circuit Judges, and PALMIERI,* District Judge.

(1) The mandate heretofore issued herein is recalled.

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*The Honorable Edmund L. Palmieri, Sr. United States District Judge for the Southern District of New York, sitting by designation.

(2) The late filing of the petition for rehearing of the Northern Cheyenne Tribe is permitted and the petition for rehearing shall be filed within 14 days from the date of filing of this order.

(3) The petition for rehearing may be of a length not to exceed 25 pages of standard typographic printing or 30 pages of printing by any other process.

(4) A response if any to the petition for rehearing shall be filed by the appellees herein within 14 days from the date of filing of the petition for rehearing and may be of the same length as authorized for the petition for rehearing.

TO CLERK OF COURT February 27, 1975
FROM JUDGE CHOY

RE: No. Cheyenne Tribe v. Littlebird, etc.
Nos. 73-1545/1546/1547

I certify that all judges concerned concur in the attached order. The clerk will please file.

/s/ HERBERT Y. CHOY
United States Circuit Judge

**Ninth Circuit Court of Appeals Judgment—
Entered October 17, 1974**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-1545

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,

v.

NORTHERN CHEYENNE DEFENDANT CLASS OF ALLOTTEES, HEIRS AND DEVISEES,
Defendant-Appellant.

No. 73-1546

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,

v.

ELVA L. LITTLECHIEF WILLIAMSON AND JAMES BOWEN,
Defendants-Appellants.

No. 73-1547

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appeliee,

v.

MYRON L. LITTLEBIRD,
Defendant-Appellant.

APPEAL from the United States District Court for the District of MONTANA (BILLINGS)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of MONTANA (BILLINGS) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here

ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is REVERSED AND REMANDED.

Filed and entered October 17, 1974

District Court Order Denying Motions for New Trial or to Amend Judgment—Entered November 28, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Civil No. 883

ORDER

THE NORTHERN CHEYENNE TRIBE,
Plaintiff,

v.

WILLIAM HOLLOWBREAST *et al.*,
Defendant.

Counsel for all of the named defendants have filed motions for a new trial or to amend the judgment. Prior to entry of its order of September 29, 1972, the court considered all of the statutes, treaties, executive orders, and cases cited in support of the motions and ruled against defendants' contentions.

Nothing has been presented to persuade the court to modify its conclusions. On the contrary, the court finds support in the per curiam opinion of the United States Supreme Court in United States v. Jim, No. 71-1509, and Utah v. Jim, No. 71-1612, 41 L.W. 3285, decided November 20, 1972. The Court held that a 1933 statute (47 Stat. 1418) conferring oil and gas royalties on Indians residing on the Anteh extension of the Navajo Reservation "did not create constitutionally protected property rights"

in the beneficiaries of the Act and upheld a 1968 Act (82 Stat. 121) enlarging the class of beneficiaries to include the entire Navajo tribe residing in San Juan County, Utah.

Defendants Williamson and Bowen, noting the similarity between the 1938 statutory grant to the residents of the Anteh extension and the 1926 Act upon which the defendants here rely, urged this court to follow the opinion of the Utah District Court (unreported) holding that the 1933 Act vested property rights in the Anteh extension residents and that the 1968 Act was unconstitutional.

The Supreme Court reversed. Following Gritts v. Fisher, 224 U.S. 640 (1912), the Court concluded:

> "Congress has not deprived the Navajo of the benefits of mineral deposits on their tribal lands. It has merely chosen to re-allocate the ° ° ° royalties ° ° ° in a more efficient and equitable manner. This was well within the power of Congress to do. As no 'property,' in a Fifth Amendment sense, was conferred upon residents of the Anteh extension by the 1933 Act, no violation of the Fifth Amendment was effected by the 1968 legislation."

The motions for a new trial or to amend the judgment are denied.

Done and dated this 28th day of November, 1972.

/s/ W. J. JAMESON
United States District Judge

District Court Judgment—Entered November 14, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

No. 883

JUDGMENT

THE NORTHERN CHEYENNE TRIBE,
Plaintiff,

v.

WILLIAM HOLLOWBREAST, *et al.*,
Defendant.

This cause came on to be heard on November 2, 1972, at the hour of 10:00 a.m. on a motion for summary judgment by plaintiff filed on October 9, 1972; the Court having considered the plaintiff's motion and the arguments of counsel, and the Court's written order and opinion of September 29, 1972, and, accordingly, as a matter of law, the plaintiff is entitled to a summary judgment in its favor upon all of the issues.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That the allottees who received allotments pursuant to the Act of June 3, 1926, as amended, their heirs or devisees, did not receive a vested property right in the coal or other minerals, including oil and gas and other natural deposits, in and under their respective allotments which is protected by the Fifth Amendment to the Constitution of the United States.

2. That the defendants' petition for an injunction and counter-claims against the plaintiff be, and the same are hereby dismissed.

3. That the defendants' motion to add the United States of America as an additional party be, and the same is hereby denied.

4. That the defendants' cross-claims against the United States of America be, and the same are hereby dismissed.

DATED this 14th day of November, 1972.

/s/ W. J. JAMESON
United States District Judge

APPENDIX C

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION

Amendment V

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES STATUTES

Act of June 3, 1926, 44 Stat. 690

An Act to provide for allotting in severalty lands within the Northern Cheyenne Indian Reservation in Montana, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Northern Cheyenne Indian Reservation heretofore set apart by Executive order dated the 19th day of March, 1900, for the permanent use and occupation of the Northern Cheyenne Indians in Montana, be, and the same is hereby, declared to be the property of said Indians, subject to such control and management of said property as the Congress of the United States may direct.

Sec. 2. That the Secretary of the Interior be, and he is hereby, authorized to cause to be prepared a complete roll containing the names of all said Northern Cheyenne Indians now living, for whom said reservation was set apart as aforesaid, which roll, when approved by him,

shall be the basis for allotting the land on said reservation, as herein provided. The Secretary of the Interior shall also cause to be prepared, in such manner as he may deem advisable, a list of the lands of said Indian reservation and to classify the same as agricultural, grazing, and land chiefly valuable for the timber thereon. As soon as practicable after the approval of said tribal roll and after the approval of said list of lands classified as above provided, the Secretary of the Interior is hereby authorized to allot in severalty lands classified as agricultural and grazing to the duly enrolled Indians in areas not exceeding one hundred and sixty acres to any individual from the lands appearing on said approved list: *Provided,* That in allotting said lands each Indian shall be allotted a proportion of the agricultural and grazing lands, respectively, such lands whenever practicable and so far as possible to be contiguous: *Provided,* That trust patents shall be issued therefor of the form and legal effect authorized by the Act of February 8, 1887 (Twenty-fourth Statutes at Large, page 388), as amended, and the lands so allotted and patented shall be designated in each case as a "homestead," which homestead shall remain inalienable and nontaxable for a period of twenty-five years from the date of issuance of patent therefor, or until the death of the allottee.

The right is hereby reserved to any Indian to select as his allotment a tract occupied by him at the time of the approval of this Act, though such lands or a part thereof may be classified as timber lands.

Sec. 3. That the timber, coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved for the benefit of the tribe and

may be leased with the consent of the Indian council under such rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That at the expiration of fifty years from the date of the approval of this Act the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall become the property of the respective allottees or their heirs: *Provided further*, That the unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians.

Sec. 4. That authority is hereby vested in the Secretary of the Interior to cause to be reserved so long as they are needed and used for the benefit of the Northern Cheyenne, suitable lands for the following purposes: For school, agency, and other administrative purposes including not to exceed one thousand two hundred and eighty acres for the boarding school at Busby, Montana, and not to exceed one hundred and sixty acres for the Birney Day School, in all not exceeding two thousand seven hundred and eighty acres; for tribal cemeteries, where needed, not to exceed in all one hundred and sixty acres: *Provided*, That with the consent of the tribal council, lands may be reserved for religious and educational purposes, including parsonage, church, cemetery, and garden sites, not to exceed forty acres at any one point; for recreational purposes having an educational feature, not to exceed ten acres at any one point; for public-school purposes, not to exceed two and one-half acres at any one point: *Provided further*, That such tracts, excepting only the tribal cemeteries, shall remain reserved only so long as they are used for the purposes for which they are set apart: *And*

provided further, That the organizations now engaged in educational and religious work on the reservation shall not be disturbed in their occupancy of the sites heretofore set apart under authority of the Secretary of the Interior so long as they continue to be used solely in the advancement of religious and welfare work for the benefit of the Northern Cheyenne Indians: *And provided further*, That the Secretary of the Interior is hereby authorized to reserve and set aside for town-site purposes not more than eighty acres at Lame Deer, Montana, and not to exceed forty acres at some other suitable location, and to survey and plat said tracts in blocks, lots, streets, alleys, parks, and school sites: *Provided further*, That the area reserved for park and school sites shall not exceed ten acres in any one town site, and patent shall be issued for such lands to the municipality legally charged with the care and custody of the lands hereby set aside for such purposes. That such town sites shall be appraised and disposed of as provided in section 2381 of the Revised Statutes: *Provided further*, That all the income of said tribe from rents, royalties, or other profits accruing from the sale of any timber, coal, or other minerals, including oil, gas, and other natural deposits herein reserved for the benefit of the said Indians, including proceeds from sales of town lots, shall be deposited in the Treasury of the United States to the credit of the Northern Cheyenne Indians and be subject to expenditure for their benefit in such manner as Congress may direct. An area not exceeding sixty feet on either side of every section line within the said reservation is hereby dedicated as public highways whenever and so far as the same may be so declared by the county commissioners of the county in

which the same may be situated, and all allotments and patents hereby authorized shall be subject to the easement hereby created. In addition to reservations heretofore herein authorized the Secretary of the Interior shall withhold from allotment any tracts in legal subdivisions in which are springs or other like sources of water supply to which cattle have been accustomed to repair for drink, together with so much land contiguous thereto as may be necessary to permit access by stock to such water supply from the highways herein provided for.

Sec. 5. That there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $30,000, or so much thereof as may be necessary, to pay the expenses of making the tribal roll, of compiling the list of lands on said reservation, for the necessary surveys and classifications, and all other expenses in connection with the allotment work: *Provided,* That the sum of $2,500 shall be available for the payment of the expenses of the tribal Indian council in holding meetings on said reservation and for the expenses of delegates which such council may have heretofore sent, or may hereafter send, to the city of Washington on tribal business.

Act of July 24, 1947, 61 Stat. 418

An Act to declare the ownership of the timber on the allotments on the Northern Cheyenne Indian Reservation, and to authorize the sale thereof.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding the provisions of the Act of June 3, 1926 (44 Stat. 690), the timber on the

allotments on the Northern Cheyenne Indian Reservation, whether or not the lands were hitherto classified as chiefly valuable for timber, are hereby declared to be the property of the allottees and may hereafter be sold pursuant to the provisions of section 8 of the Act of June 25, 1910 (36 Stat. 857; 25 U. S. C., sec. 406). Nothing contained in this Act shall be construed to require the payment to the allottees of the proceeds of sales made prior to the passage of this Act.

Act of September 22, 1961, 75 Stat. 586

An Act to grant minerals, including oil, gas, and other natural deposits, on certain lands in the Northern Cheyenne Indian Reservation, Montana, to certain Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3 of the Act of June 3, 1926 (44 Stat. 690), as amended by the Act of July 24, 1947 (61 Stat. 418), is hereby amended to read as follows:

"Sec. 3. (a) The coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved for the benefit of the tribe and may be leased with the consent of the Indian council for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396 a-f), under such rules, regulations, and conditions as the Secretary of the Interior may prescribe: *Provided,* That at the expiration of fifty years from the date of the approval of this Act, the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall become the property of the respective allottees or their heirs or devisees, subject to any outstanding leases, regardless of any prior conveyance by such allottee, heirs, or devisees of the land overlying such minerals, oil, gas or other natural deposits and regardless of the form of reference in such conveyance, or

lack of reference, to the minerals, oil, gas, or other natural deposits reserved by this Act.

"(b) Title to the minerals so granted shall be held by the United States in trust for the Indian owners, except that if upon the expiration of said fifty years the entire Indian interests in the minerals within any allotment or parcel thereof is granted by this Act to a person or persons who at that time hold an unrestricted title to the lands overlying such minerals, oil, gas, or other natural deposits, then the Secretary of the Interior shall by fee patent transfer to such person or persons the unrestricted fee simple title to such minerals, oil, gas, or other natural deposits, which title shall vest in such person or persons as of the date of the patent.

"(c) The unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians."

Act of July 24, 1968, 82 Stat. 424

An Act to grant minerals, including oil, gas, and other natural deposits, on certain lands in the Northern Cheyenne Indian Reservation, Montana, to certain Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3 of the Act of June 3, 1926 (44 Stat. 690), as amended by the Act of July 24, 1947 (61 Stat. 418), and the Act of September 22, 1961 (75 Stat. 586), is hereby amended to read as follows:

"Sec. 3 (a) The coal or other minerals, including oil, gas and other natural deposits, on said reservation are hereby reserved in perpetuity for the benefit of the tribe and may be leased with the consent of the Indian council for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396 a-f), under such

rules, regulations, and conditions as the Secretary of the Interior may prescribe.

"(b) The unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians."

SEC. 2. The Northern Cheyenne Tribe is authorized to commence in the United States District Court for the District of Montana an action against the allottees who received allotments pursuant to the Act of June 3, 1926, as amended, their heirs or devisees, either individually or as a class, to determine whether under the provisions of the Act of June 3, 1926, as amended, the allottees, their heirs or devisees, have received a vested property right in the minerals which is protected by the fifth amendment. The United States District Court for the District of Montana shall have jurisdiction to hear and determine the action and an appeal from its judgment may be taken as provided by law. If the court determines that the allottees, their heirs or devisees, have a vested interest in the minerals which is protected by the fifth amendment, or if the tribe does not commence an action as here authorized within two years from the date of this Act, the first section of this Act shall cease to have any force or effect, and the provisions of section 3 of the Act of June 3, 1926, as amended by the Acts of July 24, 1947, and September 21, 1961, shall thereupon be carried out as fully as if section 3 had not been amended by this Act.

EXECUTIVE ORDERS

Executive Order of November 26, 1884

Establishing Northern Cheyenne Reserve.

It is hereby ordered that the following-described coun-

try, lying within the boundaries of the Territory of Montana, viz: Beginning at the point on the one hundred and seventh meridian of west longitude (said meridian being the eastern boundary of the Crow Indian Reservation) where the southern 40-mile limits of the grant to the Northern Pacific Railroad Company intersects said one hundred and seventh meridian; thence south along said meridian to a point 30 miles south of the point where the Montana base line, when extended, will intersect said meridian; thence due east to a point 12 miles east of the Rosebud River; thence in a northerly and northeasterly direction, along a line parallel with said Rosebud River and 12 miles distant therefrom, to a point on the southern 40-mile limits of the grant to the Northern Pacific Railroad Company, 12 miles distant from said Rosebud River; thence westerly along the said southern limits and across the said Rosebud River to the place of beginning, be, and the same is hereby, withheld from sale and settlement, and set apart as a reservation for the use and occupation of the Northern Cheyenne Indians, now residing in the southern portion of Montana Territory, and such other Indians as the Secretary of the Interior may see fit to locate thereon: *Provided, however,* That any tract or tracts of land included within the foregoing described boundaries which have been located, resided upon, and improved by bona fide settlers, prior to the 1st day of October, 1884, to the amount to which such settlers might be entitled under the laws regulating the disposition of the public lands of the United States, or to which valid rights have attached under said laws, are hereby excluded from the reservation hereby made.

CHESTER A. ARTHUR

Executive Order of March 19, 1900

Enlarging Northern Cheyenne Reserve

It is hereby ordered that the following-described tract of land lying in the State of Montana, the same being the tract described in Senate bill 2173, 56th Congress, 1st session, which tract includes the lands embraced in the boundaries set forth in Executive order issued November 26, 1884, relative to the Northern Cheyenne reserve, be, and the same is hereby, withdrawn from sale and settlement and set apart as a reservation for the permanent use and occupation of the Indians now occupying or belonging upon the Northern Cheyenne Reservation, which reservation shall be known as the Northern Cheyenne Indian Reservation, viz:

Beginning at the point in the middle of the channel of Tongue River at its intersection with the southern forty-mile limits of the grant to the Northern Pacific Railroad Company; thence west on the said southern forty-mile limits to its intersection with the eastern boundary line of the Crow Indian Reservation; thence south on said boundary line to its intersection with the line dividing townships five and six south; thence east on said dividing line of townships five and six south; to its intersection with the line dividing ranges forty and forty-one east; thence north on said line dividing ranges forty and forty-one east to the line dividing townships four and five south; thence east on the line dividing townships four and five south to its intersection with Cook Creek; thence down Cook Creek to its confluence with Tongue River; thence down the middle of the channel of Tongue River to the place of beginning: *Provided, however,* That if upon the survey or

resurvey of the boundary lines already established it shall be found that the main stream of Cook Creek on or near the range line between ranges forty and forty-one lies south of the line dividing townships four and five south, then in that case the line running north on the range line between ranges forty and forty-one shall extend north only to the intersection of said line with the main stream of Cook Creek, and thence down Cook Creek as hereinbefore provided: *Provided further,* That in the erection of the reservation boundary fence along said Cook Creek the same shall be so erected as to divide the waters as near as may be between the north and south sides thereof: *Provided further,* That certain tracts approximating sixty-five acres, lying west of Tongue River, in sections twenty-six and thirty-four south, of range forty-three east, owned by Joseph Scott, and the northeast quarter of section three in township three south, of range forty-four east, belonging to Saint Labra's Mission, and the south half of the northwest quarter of section ten in township two south, of range forty-four east, belonging to R. P. Colbert, and the south half of section seven, in township two south, range forty-four east, belonging to John Barringer, shall be excepted from and not included within the reservation boundaries named.

WILLIAM MCKINLEY

APPENDIX D

TRIBAL DOCUMENTS

Letter from Northern Cheyenne Chiefs and Headsman to Senator Thomas J. Walsh Enclosing Petition for Allotment—dated February 3, 1925

DEPARTMENT OF THE INTERIOR
UNITED STATES INDIAN FIELD SERVICE
Tongue River Agency.
Lame Deer, Mont.

February 3, 1925.

Hon. T. J. Walsh,
U. S. Senator,
Washington, D. C.

Dear Mr. Walsh:

We transmit herewith a petition signed by all of the people belonging to this reservation that we were able to see in the short time allowed. In fact we encountered no opposition whatever, and they were all in hearty accord with the allotment idea. Also we thought it advisable to get you the following data and reasons for allotment so as to arm you for argument with the Indian Office. We can assure you in advance that all the data contained in our letter is authentic:

No. 1. Present Farm acreage.....20,000
No. 2. Available " " .....80 to 100,000

Crops raised during the past year:

Tonage of hay	6,000 Tons
Oats	34,220 Bu.
Wheat	37,456 Bu.
Potatoes	5,000 Bu.
Corn	3,000 Bu.

Reimbursable—The flour mill should be reimbursed from grazing funds instead of robbing the Indians for grinding

fee, (this mill was promised by a treaty to the Indians). Approximately $33,000 should have been collected by grinding fee in the last eight years and $9.25 was all that was ever turned in toward this flour mill debt up to the time the present Superintendent came here—January 1, 1924.

The Northern Cheyennes are better prepared to receive allotment than the majority of tribes at the time they were allotted. The reason why we make this statement is the facts to be gathered by the farm reports of the last two or three years which are available for inspection.

Heirship Troubles—Allotment will enhance permanency of future farm activities, and the enhancement of the Five Year Program will solve the heirship trouble in the matter of probating estates which at present is in a very unsatisfactory and chaotic condition.

By making them an allotment they will make greater efforts to improve both their land and conditions of living and therefore become better citizens.

At the present time and under the present conditions they hesitate to carry out to their full capacity their home building and farm and livestock production, not knowing where the boundaries of their lands are, and also not knowing whether they will ever get any such lands because of this being an Executive Order Reservation, and subject to will of the Congress of our Nation.

All Reimbursable tribal debts for sawmills, steam engines, threshing machines, and gasoline tractors and all other reimbursable tribal implements should be paid from the grazing fund or any other funds that may be to the credit of the Northern Cheyennes, as these funds become available from time to time.

There is a tribal debt for an irrigation ditch on Tongue River of approximately $140,000, and at the present time the above ditch is useless on account of the need for repairs and as a rough estimate, it will take probably about $25,000 to repair it and make it fit for use.

Along with this ditch debt there is a tribal herd called the RC that was purchased with reimbursable funds about $100,000 and is still a debt against the tribe and at the present there is probably 168 head of cattle left in said herd.

Also besides the Tribal debts above mentioned there is an enormous individual Indian reimbursable debt that is hanging over the Northern Cheyennes.

The debts are due June 30, 1925.

But, as the tribe or the Indians individually are unable to meet these obligations we ask that the two last mentioned tribal debts be cancelled, and an extention of twenty-five years be given the Individual Indians so that they may have time to pay their debts to the Government, through the proceeds of their labor and not by the taking of their tribal resources to be applied on the debt.

Under these circumstances the Government should be protected by making an allotment of lands into severalities to these Indians so that in case of death there may be some collateral available by which the debt may be liquidated for the deceased personal obligations, which heretofore has not been possible. There were Indians who contracted some of the debts and are dead and according to the wording of the contract, their heirs are responsible for the debt, and thus the request for allotment to make this protection for the Government.

Also we wish to advise you that when the Commissioner of Indian Affairs was here in Sept. 1923, he promised us people that he would see that we were allotted, and in conclusion we thank you for your aid in getting us allotted and for Mr. Burke to keep faith with us,

Very truly yours,

Chiefs

/s/ EUGENE STANDING ELK
VICTOR LITTLE CHIEF [his thumbprint]
OTIS FINGERS [his thumbprint]

Headsmen

CHAS. SPOTTED ELK [his thumbprint]
JOHN TWO MOONS [his thumbprint]
DAVID LITTLE WHITE MAN [his thumbprint]

Attest

/s/ RUFUS ROLLINGBULL
/s/ CHAS. TALLBULL
/s/ JOHN TALLWHITEMAN

Petition of Northern Cheyenne People to Senator Thomas J. Walsh Requesting Allotment— submitted February 3, 1925

A PETITION TO
THE HON. T. J. WALSH, U. S. SENATOR

We, the undersigned members of the Northern Cheyenne Indian Tribe, of the State of Montana, do hereby humbly beseech you to do all in your power to have a Bill introduced and passed in Congress, to have an allotment of not less than 320 acres of tillable farm land made to each and every member of the Northern Cheyenne Indians.

To reserve all mineral, timber, and coal lands for the benefit of the Northern Cheyenne Indian Tribe, said tribe to have absolute control of same.

As our Reservation is rather small, and as we understand that the old Fort Keough Military Reservation has been abandoned for military purposes, we ask you to try and have enough land to give each member of the tribe the above asked for 320 acres.

[Followed by 37 pages of marks, thumbprints and signatures of approximately 500 members of the Northern Cheyenne Indian Tribe]

Form of Trust Patent for Northern Cheyenne Allotments

THE UNITED STATES OF AMERICA

To all to whom these presents shall come, Greeting:

WHEREAS, a schedule of allotments approved by the Secretary of the Interior has been deposited in the General Land Office, whereby it appears that in accordance with the provisions of the Act of Congress of June 3, 1926 (44 Stat. 690), ... an Indian of the Northern Cheyenne Indian Reservation, has been allotted the following described land as a Homestead:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, has allotted, and by these presents does allot, unto the said Indian the above-described land as a Homestead, subject to all the provisions, conditions, limitations and restrictions contained in said Act of June 3, 1926, and hereby declares that it does and will hold the land so allotted in trust for the sole use and benefit of the said allottee, inalienable and nontaxable for the period of twenty-five years from date hereof, or until the death of said allottee, and that at the expiration of said period the United States will convey to said Indian, or to her heirs, as the case may be, the fee to said land, discharged of said trust and free of all charges or incumbrance whatsoever. Should said Indian die before the expiration of said twenty-five years, then the Secretary of the Interior shall determine the heirs of said Indian and either issue to them a patent in fee for said land, or cause the same to be sold for their benefit as provided by law.

There is reserved from the land hereby allotted a right of way thereon for ditches or canals constructed by the authority of the United States. There is also reserved for the benefit of the Northern Cheyenne Indians, all the coal or other minerals, including oil, gas, and all natural deposits in said land. An area not exceeding sixty feet on either side of every section line within the said reservation, dedicated by said Act as public highways whenever and so far as the same may be so declared by the county commissioners of the county in which the same may be situated, it also reserved.

IN TESTIMONY WHEREOF, I, HERBERT HOOVER, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the day of in the year of our Lord one thousand nine hundred and and of the Independence of the United States the one hundred and

By the President:

By.....,Secretary
Recorder of the General Land Office

RECORDED: Patent Number

Supreme Court, U. S.
FILED
FEB 5 1976
MICHAEL RODAK, JR., CLERK

SINGLE APPENDIX

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-145

THE NORTHERN CHEYENNE TRIBE,
Petitioner,
v.
WILLIAM HOLLOWBREAST, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 26, 1975
CERTIORARI GRANTED OCTOBER 14, 1975

SUBJECT INDEX

Relevant Docket Entries — *Page*

In The District Court:

Amended Complaint 2

Answer, Counter-Claims and Cross-Claims of Tribal Defendants 8

Answer of Defendants Williamson and Bowen 22

Answer of Defendant Littlebird 24

Plaintiff's Reply to Tribal Defendants' Counter-Claims 25

Amended Answer and Counter-Claim of Defendants Williamson and Bowen 27

Plaintiff's Reply to Defendants Williamson and Bowen's Counter-Claim 28

Order and Memorandum Opinion Denying Tribal Defendants' Motion To Add United States As Cross-Defendant 29

Pre-Trial Order 35

Final Order and Opinion
(*See* Petition For Writ of Certiorari at .....A-12-29)

Final Judgment
(*See* Petition For Writ of Certiorari at .....A-36-37)

Order Denying Motions For New Trial Or To Amend Judgment 40

In The Ninth Circuit Court of Appeals:

Opinion
(*See* Petition For Writ of Certiorari at .....A-1-11)

Judgment
(*See* Petition For Writ of Certiorari at .....A-33-34)

Order Recalling Mandate and Granting Leave To File Untimely Petition For Rehearing 44

Order Denying Petition For Rehearing 45

	Page
Typical Allotment Patent	45
Letter From Jerome Red Bird to Senator Thomas J. Walsh of Montana, dated November 25, 1924	47
Letter From Senator Thomas J. Walsh of Montana to Commissioner of Indian Affairs Charles H. Burke, dated December 2, 1924	49
Letter From Commissioner of Indian Affairs Charles H. Burke to Senator Thomas J. Walsh of Montana, dated December 8, 1924	50
Letter From Senator Thomas J. Walsh of Montana to Jerome Red Bird, dated December 13, 1924	52
Letter From Northern Cheyenne Chiefs and Headsmen to Senator Thomas J. Walsh of Montana, dated February 3, 1925, Transmitting Tribal Petition	53
Tribal Petition to Senator Thomas J. Walsh of Montana, January-February, 1925, Seeking Allotment Act	56

RELEVANT DOCKET ENTRIES

Date	*Proceedings*	*Single Appendix Page No.*
1970		
July 2	Complaint filed ....(not included)	
September 4	Order filed granting, *inter alia*, leave to file amended complaint ....(not included)	
September 8	Amended complaint filed	2
1971		
September 30	Order and memorandum opinion filed denying defendants' motions to join United States as involuntary plaintiff, applications for temporary injunction, and motions to dismiss for lack of jurisdiction; and holding that action is proper class action ....(not included)	

Date	*Proceedings*	*Single Appendix Page No.*
1972		
January 10	Order filed denying defendants' motions to dismiss, to quash service, and to permit interlocutory appeal ....(not included)	
January 12	Memorandum opinion filed supplementing above order of January 10, 1972 ....(not included)	
February 9	Answer, counter-claims and cross-claims of tribal defendants filed	8
February 10	Answer to defendants Williamson and Bowen filed	22
February 10	Answer of defendant Littlebird filed	24
March 1	Plaintiff's reply to tribal defendants' counter-claims filed	25
March 2	Defendants' Williamson and Bowen's amended answer and counter-claim filed	27
March 17	Plaintiff's reply to defendants Williamson and Bowen's counter-claim filed	28
July 10	Pre-trial order filed	35
September 29	Final order and opinion filed (*See* Petition for Writ of Certiorari at ....A-12-29)	
November 14	Final judgment filed (*See* Petition for Writ of Certiorari at ....A-36-37)	
November 28	Order filed denying defendants' motions for new trial or to amend judgment	40
December 26	Tribal defendants' notice of appeal to the Ninth Circuit Court of Appeals filed ....(not included)	

Date	*Proceedings*	*Single Appendix Page No.*
December 26	Defendants Williamson and Bowen's notice of appeal to Ninth Circuit Court filed .....(not included)	
December 29	Defendant Littlebird's notice of appeal to Ninth Circuit Court of Appeals filed .....(not included)	
1974		
October 17	Ninth Circuit Court of Appeals judgment filed reversing District Court judgment. (*See* Petition for Writ of Certiorari at .....A-33-34)	
October 17	Ninth Circuit Court of Appeals opinion filed. (*See* Petition for Writ of Certiorari at .....A-1-11)	
1975		
February 28	Ninth Circuit Court of Appeals order filed recalling mandate and granting leave to file untimely petition for rehearing	44
April 28	Ninth Circuit Court of Appeals order filed denying petition for rehearing	45
July 26	Petition for Writ of Certiorari filed and docketed in United States Supreme Court .....(not included)	
October 14	Petition for Writ of Certiorari granted .....(not included)	

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-145

THE NORTHERN CHEYENNE TRIBE,
Petitioner,
v.
WILLIAM HOLLOWBREAST, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SINGLE APPENDIX

DISTRICT COURT — AMENDED COMPLAINT
Filed Sept. 8, 1970

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE NORTHERN CHEYENNE TRIBE, *Plaintiff*, v. WILLIAM HOLLOWBREAST, GRACE KINGFISHER, RAYMOND BRADY, SR., KENNETH BEARTUSK, WINONA FOX, JAMES LIMBERHAND, HENRY FISHER, BESSIE ELKSHOULDER, NELLIE ROBINSON, RAYMOND HARRIS, SR., DELORES WALTERS MURDOCK and ELVA L. LITTLECHIEF WILLIAMSON, individually and as representatives of all allottees, their heirs or devisees who received allotments pursuant to the Act of Congress of June 3, 1926, as amended, *Defendants*.	CIVIL CAUSE NO. 883

COMES NOW the plaintiff and for its cause of action complains and alleges as follows:

I.

This is an action to determine whether the allottees who received allotments pursuant to the Act of June 3, 1926, as amended, their heirs or devisees, received a vested property right in the coal or other minerals, including oil, gas and other natural deposits in and under the lands allotted to said allottees of the Northern Cheyenne Tribe under said Act which is protected by the fifth amendment. The plaintiff is authorized to bring

this action by and under the provisions of Public Law 90-424 approved by the President on July 24, 1968 (82 Stat. 424, 425). Attached to this Complaint and made a part thereof, as Appendix "A", is a true and correct copy of said Public Law. The jurisdiction of this Court is confirmed by said Public Law.

II.

The plaintiff, Northern Cheyenne Tribe, also known as the Northern Cheyenne Tribe of the Tongue River Reservation, Montana, is a federal corporation chartered under the Act of June 18, 1934, (48 Stat. 984) as amended by the Act of June 15, 1935 (49 Stat. 378) and is a recognized Indian Tribe organized under a Constitution and By-Laws ratified by the Tribe on November 2, 1935 and approved by the Secretary of the Interior of the United States on November 23, 1935, and amended by ratification by the Tribe on April 12, 1960 and approved by the Secretary of the Interior of the United States on July 8, 1960, all pursuant to said Act.

III.

This is a class action and the same is brought by the plaintiff against the defendants, William Hollowbreast, Grace Kingfisher, Raymond Brady, Sr., Kenneth Beartusk, Winona Fox, James Limberhand, Henry Fisher, Bessie Elkshoulder, Nellie Robinson, Raymond Harris, Sr., Delores Walters Murdock and Elva L. Littlechief Williamson, both as individuals and as representative parties of and on behalf of all the allottees who received allotments pursuant to said Act of June 3, 1926 (44 Stat. 690), as amended, their heirs and devisees; that said above named

defendants, as individual defendants of this action, and, as representatives on behalf of said class, which consists of said allottees, their heirs and devisees, are similarly situated in that said defendants named herein are all allottees and heirs or devisees of allottees who received allotments pursuant to said Act of June 3, 1926, as amended; that (1) the allottees who received allotments pursuant to said Act, as amended, their heirs and devisees, amount in number to approximately One Thousand Four Hundred Eighty-nine (1,489) persons, and said persons are located at and reside in, various places throughout the United States, and therefore are so numerous as to make it impracticable to bring them all before the Court; that likewise, said Act of July 24, 1968 (Appendix "A") specifically authorizes the commencement of this action by the plaintiff against said persons as a class action; (2) there are questions of law or fact present in this action which are common to said entire class, which consist of a determination and decision in this action of whether said allottees, their heirs or devisees, received a vested property right in said minerals which is protected by the fifth amendment; (3) the defenses and claims of said named defendants are typical of the defenses and claims of said class; (4) said defendants hereinnamed as representative parties on behalf of said class will fairly and adequately protect the interests of said class; in addition thereto (b)(1)(a) the prosecution of separate actions against the individual members of said class would create a risk of inconsistent or varying adjudications which [*sic*] respect to individual members of said class which would establish incompatible standards of conduct for the plaintiff, and (b)(1)(B) adjudications which [*sic*] respect to individual members of the class would, as a practicable matter, be dispositive of the interests of the other members not parties to the adjudications, or substantially impair or impede their ability to protect their interest; and (b)(2) the plaintiff is hereby acting on the grounds generally applicable to said class thereby making appropriate final declaratory relief with respect to said class as a whole; and (b)(3) the questions of law or fact common to the members of said class predominate over any questions affecting only individual members and a class action is superior to other available methods for the fair and efficient adjudication of the controversy herein alleged and set forth.

IV.

Section 2 of said Public Law herein referred to (Appendix "A") confirms the right of the plaintiff to bring an action in this Court against the allottees who received allotments pursuant to the Act of June 3, 1926 (44 Stat. 690) as amended, their heirs or devisees, either individually or as a class to determine whether under the provisions of said Act of June 3, 1926, as amended, the allottees, their heirs or devisees, have received a vested property right in the minerals which is protected by the fifth amendment. The plaintiff herein alleges that said allottees, their heirs or devisees did not by said Act or otherwise receive, and do not now have, a vested property right in the coal or other minerals, including oil, gas and other natural deposits of said allotted lands on the said reservation which is protected by the fifth amendment.

WHEREFORE, plaintiff demands judgment:

1. That it be adjudged and decreed by the above-en-

titled Court that said allottees who received allotments pursuant to said Act of June 3, 1926, as amended, their heirs or devisees, did not receive a vested property right in the coal or other minerals, including oil, gas and other natural deposits of said Northern Cheyenne Indian Reservation which is protected by the fifth amendment to the Constitution of the United States;

2. That said coal or other minerals, including oil, gas and other natural deposits on said reservations, are reserved in perpetuity for the benefit of the Northern Cheyenne Tribe.

3. That the plaintiff have such other and further relief as may be just and proper, together with costs and disbursements of this action.

DATED this 8th day of September, A.D. 1970.

BERT W. KRONMILLER and
CLARENCE T. BELUE,
Kronmiller Building,
Hardin, Montana, 59034

By /s/ BERT W. KRONMILLER
Attorneys for Plaintiff

APPENDIX "A"
[to Amended Complaint]

Public Law 90-424
90th Congress, H.R. 5704
July 24, 1968

AN ACT

To grant minerals, including oil, gas, and other natural deposits, on certain lands in the Northern Cheyenne Indian Reservation, Montana, to certain Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3 of the Act of June 3, 1926 (44 Stat. 690), as amended by the Act of July 24, 1947 (61 Stat. 418), and the Act of September 22, 1961 (75 Stat. 586), is hereby amended to read as follows:

"Sec. 3. (a) The coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved in perpetuity for the benefit of the tribe and may be leased with the consent of the Indian council for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a-f), under such rules, regulations, and conditions as the Secretary of the Interior may prescribe.

"(b) The unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians."

Sec. 2. The Northern Cheyenne Tribe is authorized to commence in the United States District Court for the Dis-

trict of Montana an action against the allottees who received allotments pursuant to the Act of June 3, 1926, as amended, their heirs or devisees, either individually or as a class, to determine whether under the provisions of the Act of June 3, 1926, as amended, the allottees, their heirs or devisees, have received a vested property right in the minerals which is protected by the fifth amendment. The United States District Court for the District of Montana shall have jurisdiction to hear and determine the action and an appeal from its judgment may be taken as provided by law. If the court determines that the allottees, their heirs or devisees, have a vested interest in the minerals which is protected by the fifth amendment, or if the tribe does not commence an action as here authorized within two years from the date of this Act, the first section of this Act shall cease to have any force or effect, and the provisions of section 3 of the Act of June 3, 1926, as amended by the Acts of July 24, 1947, and September 21, 1961, shall thereupon be carried out as fully as if section 3 had not been amended by this Act.

Approved July 24, 1968.

DISTRICT COURT—ANSWER, COUNTER-CLAIMS AND CROSS-CLAIMS OF TRIBAL DEFENDANTS

Filed Feb. 9, 1972

[Caption Omitted in Printing]

Comes now all of the above named tribal defendants, individually and as representatives of all allottees, their heirs or devisees who received allotments pursuant to the Act of Congress of June 3rd, 1926, as amended, and answers, counter-claims and cross-claims as follows:

FIRST DEFENSE

The amended complaint fails to state a claim against the defendants upon which relief can be granted.

SECOND DEFENSE

1. The Court lacks jurisdiction because the alleged claim as it appears on the face of the amended complaint does not arise under the Constitution, laws, or treaties of the United States as is alleged therein, and therefore the Court lacks jurisdiction of the subject matter.

2. The Court lacks jurisdiction because neither the original summons and complaint nor the amended summons and complaint have been served personally upon all of the individual Cheyenne Indian defendants, and that therefore pursuant to F.R.C.P. 23, there has been insufficient service of process and insufficient and improper notice to the defendants and the Court lacks in personam jurisdiction of defendants.

3. The Court lacks jurisdiction as there is no class or classes in existence within the meaning of F.R.C.P. 23, where the several classes [*sic*] interests in the subject matter are antagonistic to one another.

4. The Court lacks jurisdiction because pursuant to F.R.C.P. 23(a) there has been no showing that the named defendants will fairly and adequately protect the interests of the alleged class.

THIRD DEFENSE

The amended complaint fails to show the existence of an actual controversy between the parties of the nature required by Article III of the United States Constitution and Section 2201 of the Judicial Code, U.S.C. Title 28.

FOURTH DEFENSE

I.

Admit the first allegation stated in paragraph one of the plaintiff's amended complaint only to the extent set forth in the first counter-claim and the first cross-claim as hereinafter set forth, and deny each and every other allegation contained in paragraph one thereof.

II.

Admit each and every allegation contained in paragraph two of the plaintiff's amended complaint.

III.

Deny each and every allegation contained in paragraph three of the plaintiff's amended complaint.

IV.

Deny each and every allegation contained in paragraph four of the plaintiff's amended complaint, and further deny that the plaintiff is entitled to any relief prayed for in its amended complaint or to any other legal or equitable relief or remedy whatsoever.

FIFTH DEFENSE

The special statute Public Law 90-424 of July 24th, 1968, (32 Stat. 424, 425) and any and all other amendments to the Northern Cheyenne Allotment Act of June 3, 1926 (44 Stat. 690) as set out in the plaintiff's amended complaint upon which plaintiff relies, are illegal, null, void and contrary to public policy and also violates [*sic*] Amendment V of the United States Constitution and Article III, Section 27 of the Montana Constitution.

WHEREOF, defendants pray for judgment as hereinafter set forth.

FIRST COUNTER-CLAIM

I.

This counter-claim is brought pursuant to special statute Public Law 90-424 of July 24th, 1968 (32 Stat. 424, 425), which the plaintiff alleges in its amended complaint gives rise to its authority to bring this action in the first instance, in this Court, and upon which said special Act whether valid or not, the defendants now allege carries with it then, the implied permission, right and grant of authority to the defendants to counter-claim as a class against the plaintiff tribe pursuant to F.R.C.P. 23, in the same jurisdictional Court.

II.

Jurisdiction is further conferred upon this Court pursuant to 28 U.S.C. p. [*sic*] 1353 for the purpose of this counter-claim against the plaintiff, or any other counter-claims hereinafter enumerated against the plaintiff.

III.

The plaintiff owes the defendants all monies had and received by it from the United States of America, or had and received by it from any permittee, pursuant to the sales of all prospecting permits, whether or not containing options to lease the mineral rights pertaining to the allotted lands, to be paid by plaintiff to defendants.

WHEREFORE, defendants pray judgment as hereinafter set forth.

FIRST CROSS-CLAIM

I.

This cross-claim is brought pursuant to special statute Public Law 90-424 of July 24th, 1968 (32 Stat. 424, 425),

which the plaintiff alleges in its amended complaint gives rise to its authority to bring this action in the first instance in this Court, and upon which said special Act, whether valid or not, the defendants now allege carries with it then, the implied permission, right and grant of authority to the defendants to cross-claim as a class against the United States of America, as their fiduciary trustee and title holder of their individual allotments, pursuant to F.R.C.P. 23, in the same jurisdictional Court.

II.

Jurisdiction is further conferred upon this Court pursuant to 25 U.S.C., Section 345, for the purpose of this cross-claim against the United States of America or any other cross-claims hereinafter enumerated against the United States of America.

III.

This cross-claim is in the nature of a declaratory judgment action pursuant to 28 U.S.C. p. [*sic*] 2201, for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears, and to quiet title to the minerals in and under the defendants [*sic*] allotments, as are all other cross-claims hereinafter numerated [*sic*] against the United States of America.

IV.

Pursuant to the Act of June 2, 1924, (Chapter 233, 43 Statute [*sic*] at large 253) defendants were then, and are now, citizens of these United States of America, and were then, and are now, vested with and entitled to all the rights, privileges, benefits, guarantees and protection of the United States Constitution.

V.

Defendants took and received their respective allotments pursuant to the Act of June 3, 1926, (44 Statute [*sic*] 690) in good faith, and in reliance thereon, and defendants did enter into, and take possession of, and occupy their respective allotments ever since, which were then, and are now unique interests and unique pracels of land.

VI.

Defendants received a vested property right in the coal or other minerals, including oil, gas and other natural deposits, in and under the lands allotted to them pursuant to the Act of June 3, 1926 (44 Stat. 690) which was then, and which is now protected by the Fifth Amendment to the United States Constitution.

VII.

The original Northern Cheyenne Tribe was not a Federal corporation at the time of the enactment of 44 Statute [*sic*] 690, but was in fact a recognized natural band or tribe of North American aborigines, which said band or tribe was not chartered as a Federal corporation until the Act of June 18, 1934, (48 Stat. 984) as amended by the Act of June 15, 1935 (40 Stat. 378) and that they then became a recognized Indian Tribe organized under a constitution and By-Laws ratified by the tribe on November 2, 1935, and approved by the Secretary of the Interior of the United States on November 23, 1935, and amended by ratification by the tribe on April 12, 1960, and approved by the Secretary of the Interior of the United States on July 8, 1960, all pursuant to said Act, and therefore the Federal corporation was then, and is now, a separate and distinct legal entity from its members, and the Act of June 3, 1926 (44

Stat. 690) Section 3, reserving the minerals for the benefit of the tribe for a period of fifty years, referred to the natural band or tribe of North American Aboriginies, as they existed at that time, which band was comprised of the individual allottees, their heirs or devisees and did not refer to the plaintiff federal corporation.

VIII.

Defendants rights in their allotments, and in the minerals in and under their allotments, arose first in time and were then and are now protected by the United States Constitution Amendment V, and therefore pursuant to 44 Stat. 690, Sections 3 and 4 thereof, all income from defendants [*sic*] allotments, including all monies received from the sale of all prospecting permits, whether containing options to lease or not, and all monies from leases, rents, royalties, or other profits should have been placed in the Treasury of the United States, pending the final termination of this litigation, and instead and in fact, the income received from these allotted lands was disbursed to the plaintiff tribe by the United States of America, in violation of law, and in breach of duties owed the defendants by the United States of America.

IX.

The United States of America by the enactment of the 1968 amendment itself (32 Stat. 424) and any other amendment, attempted to do indirectly that which it is prohibited by law from doing directly without just compensation to the defendants, and it did place upon the federal tribe corporation, under color of title to the minerals, the onus of prosecuting this civil suit against the defendants, and the fiduciary trustee did thereby thrust,

compel and otherwise instigate and authorize by this act, one cestui que beneficiary to sue the other cestui que beneficiary, in violation of its trustee responsibilities and duties and in violation of the United States Constitution Amendment V.

X.

The United States of America did by and through its appropriate political subdivisions, departments, bureaus, officers, agents, servants and employees offer and conduct the sales of certain prospecting permits on various dates, after the plaintiff had commenced this lawsuit, and in conducting said sales, the fiduciary trustee to the allotted lands did make the printed material representation to the prospective bidders that "Title to the sub-surface is vested in the Northern Cheyenne Tribe" (See page 1 of the Notice of Competitive Sale No 3 on file as part of plaintiff's Exhibit "A" which is made a part of hereof by reference herein as if fully set forth herein) and which said representation was then and there false, and which the trustee knew, or should have known, was then and there false, and that therefore the said trustee did intentionally, maliciously, or negligently and carelessly, authorize, condone, control, participate and conduct the sales of said prospecting permits in and for the plaintiff tribal corporation, thereby foursquare placing itself on the side of plaintiff, in violation of its trust responsibilities to defendants and all to the further detriment and damages to defendants.

XI.

Therefore, because of the illegal taking of defendants property without due process of law, equal protection, or just compensation, and because of the other wrongful, un-

conscionable and reprehensible behavior and conduct of the United States of America while acting as trustee of defendants' allotments, the defendants have been [*sic*], are being [*sic*], and will continue to suffer irreparable harm, injury and damages in the future, to the extent of all monies paid, or to be paid the plaintiff from the sales of prospecting permits, leases, or for any minerals extracted to date, or to be extracted in the future and for any other income from rents, royalties or other profits accruing from the defendants' allotments paid to plaintiff by the United States of America, and defendants have been [*sic*], are being [*sic*] and will continue to suffer irreparable harm, injury and damage in the future in that the use and occupancy of their respective allotments are limited, if usable or occupiable at all, and that the contamination and pollution caused, or to be caused, in the future, to the defendants [*sic*] waters, lakes, streams and rivers in or under or surounding their allotted lands, and the contamination and pollution caused to the envionment [*sic*] and air above and surrounding the allotments, and the defendants have been, are being, and will continue to suffer irreparable harm, injury and damage in the future in the use and occupancy of their allotments by the destruction and ruination of their hunting, fishing, camping, natural resources and scenery, and the destruction of natural landmarks, historical and religious shrines, and vision quest sites and further damaged by the desecration and ravishment of their sacred mother earth.

WHEREFORE, defendants pray for judgment as hereinafter set forth.

SECOND COUNTER-CLAIM AND CROSS CLAIM

I.

Defendants incorporates [*sic*] herein by reference all of the allegations of all paragraphs of the first counter-claim and first cross-claim as if fully set forth herein.

II.

Defendants are the real, true and beneficial owners of certain allotted lands in the Counties of Big Horn and Rosebud, in the State of Montana, more particularly described and set forth in great detail by plaintiff's exhibits "A" and "B" which are hereby made a part of hereof by reference as if fully set forth herein, and which said allotted lands were received pursuant to the Act of June 3rd, 1926, 44 Statute 690, which included a vested property right in the minerals.

III.

The plaintiff tribe and the United States of America, as title holder to defendants' allotments, did by their officers, agents, or servants, act in concert, collusion and in participation with each other, and did enter into and upon defendants' allotments on numerous and sundry occasion, or did cause, license and permit other certain third party permittees, their agents, servants or employees, to enter into and upon said allotments during the months prior to and subsequent to the filing of this lawsuit, which defendants to their best knowledge and belief [*sic*] occurred during the years 1970, 1971 and 1972, all without the knowledge and consent of defendants, and the afore-described trespassers did dig, drill, core and excavate earth and minerals and destroyed timber and shrubs and otherwise muti-

lated and desecrated the allotted lands and the subsurface, and did further take, remove and convert to their own use, samples and other large quantities of ore and minerals therefrom, and did otherwise commit waste thereon, all to the damage of the defendants and shall continue to so do in the future.

WHEREFORE, defendants pray judgment as hereinafter set forth.

THIRD CROSS-CLAIM

I.

Jurisdiction is conferred on this Court pursuant to the Federal Tort Claims Act, 28 U.S.C. 1346 (b), 1402 and 2675, et sq. [*sic*], as hereinbefore and hereinafter more fully appears.

II.

Defendants incorporate herein by reference all of the allegations of all paragraphs of the First and Second Cross-Claims against the United States of America as if fully set forth herein.

III.

The plaintiff is a citizen of the State of Montana, and the defendants are United States citizens residing in various and diverse states and foreign countries, and the matter in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00), Exclusive of interests and costs in respect to each of the defendants.

WHEREFORE, defendants pray judgment for money damages as hereinafter set forth.

FOURTH CROSS-CLAIM

I.

Jurisdiction is conferred on this Court pursuant to the Tucker Act, 28 U.S.C. P. [*sic*] 1346 (a) (2) as hereinbefore and hereinafter more fully appears and is brought to recover compensation for certain allotted lands of defendants in the counties of Big Horn and Rosebud, State of Montana, appropriated directly or indirectly for the public use, and damages to the residue of the tract, as hereinbefore and hereinafter more fully appears, and for the purposes of this cross-claim only defendants claims for damages does [*sic*] not exceed Ten Thousand Dollars ($10,000.00) per defendant, and said cross-claim is founded upon the Fifth Amendment to the Constitution of the United States.

II.

Defendants incorporate herein by reference all of the allegations of all paragraphs of the First and Second Cross-claims against the United States of America, as if fully set out herein.

III.

There has been a wrongful and illegal taking of valuable mineral interests in and under the defendants allotted lands, both directly and indirectly by the United States of America, its officers, agents, servants, employees or other representatives and said taking was without the knowledge, consent, or permission of the defendants and was a tortious breach of the duties owed by the trustee under an express or implied contract with each cestui que allottee, heir or devisee.

WHEREFORE, defendants prays and demand that this Court adjudge:

1. That the defendants have a vested property right in the minerals, including oil and gas and other natural deposits in and under their allotted lands since the enactment of the Act of Congress, of June 3, 1926, (44 Stat. 690) which is protected by the Fifth Amendment to the United States Constitution;

2. That the amendment of July 24, 1968, (32 Stat. 424, 425) is illegal, null, void, and of no force and effect whatsoever, and plaintiff's complaint be dismissed with costs of this suit, and attorneys fees assessed against it;

3. That the plaintiff tribe pay over all monies held by it from the sales of prospecting permits, or leases, or any income pertaining to the minerals in the allotted lands, plus interest thereon, to the defendants, and that the plaintiff be permanently enjoined and restrained from receiving any income from the allotted lands in the future;

4. That the United States pay over all monies still held by it from the sales of all prospecting permits or leases or other income to the defendants pertaining to defendants allotted lands, plus interest thereon;

5. That the plaintiff tribe and the United States, their officers, agents, servants, employees or other representatives, including independent contractors, licensees, or permittees, be permanently enjoined and restrained from entering in and upon the defendants [*sic*] allotted lands for any purpose whatsoever, without defendants [*sic*] permission:

6. That the defendants be awarded judgment for penal special and general damages against the United States of

America and the plaintiff tribe in such amounts as this Court shall determine;

7. That the defendants be awarded judgment for special and general damages against the United States of America pursuant to the Federal Tort Claims Act, in such amounts as the Court shall determine;

8. That the defendants be awarded judgment for special and general damages not exceeding Ten Thousand Dollars ($10,000) per allottee, heir or devisee against the United States of America, pursuant to the Tucker Act;

9. That the defendants recover all costs and expenses incurred by reason of this lawsuit, including court costs and attorney fees, and for such other and further relief as to the Court may seem just and proper.

LEWIS E. BRUEGGEMANN and
MARION B. PORTER

By /s/ LEWIS E. BRUGGEMANN

Lewis E. Brueggemann
456-8 Hart-Albin Building
Billings, Montana 59101
Attorneys for Defendants

[Certificate of Service Omitted in Printing]

DISTRICT COURT—ANSWER OF DEFENDANTS WILLIAMSON AND BOWEN

Filed Feb. 10, 1972
[Caption Omitted in Printing]

Comes now defendants Elva Littlechief Williamson and James Bowen and plead as follows:

I.

Defendants deny the allegations of Paragraph I of the Plaintiff's Amended Complaint to the extent that this court has jurisdiction to hear the above-entitled matter and for their objections, defendants continue to rely on their motions and memoranda previously submitted.

II.

Defendants admit the allegation set forth in Paragraph II of the Plaintiff's Amended Complaint.

III.

1. Defendants deny all the allegations in Paragraph III of the Plaintiff's Amended Complaint that refer to the existence of a proper class under Rule 23 (a) and (b), F.R.C.P., as amended, and for their objections, defendants continue to rely on their motions and memoranda previously submitted.

2. Defendants further state that they have no knowledge of the number of persons who are alleged to be the allottees, their heirs or devisees pursuant to the Act of June 3, 1926.

IV.

1. Defendants deny all parts of Paragraph IV of the Plaintiff's Amended Complaint that refer to the existence of

a proper class action or to the jurisdiction of this court to hear the above-entitled matter and for their objections, defendants rely on their motions and memoranda previously submitted.

2. Defendants further deny the allegations of Paragraph IV of the Plaintiff's Amended Complaint that alleges that allottees, their heirs or devisees did not receive or do not now have, by virtue of the Act of June 3, 1926, a vested property right in the coal or other minerals including gas and other natural deposits beneath their allotments, that is protected by the Fifth Amendment.

V.

As a first defense, defendants allege that the Amended Complaint fails to state a claim upon which relief can be granted.

VI.

As a second defense to the above action, defendants claim that the United States is an indispensable party to this action and should be joined as such under Rule 19, F.R.C.P., and for their reasons, defendants will rely on motions and memoranda previously submitted.

VII.

As a third defense to the above action, defendants claim that the Act of July 24, 1968, Public Law 90-424 is unconstitutional in that Congress was without authority to enact said legislation.

WHEREFORE, defendants Elva Littlechief Williamson and James Bowen demand judgment dismissing the above-entitled action.

DATED this 10th day of February, 1972.

By: /s/ THOMAS J. LYNAUGH
THOMAS J. LYNAUGH
BARNEY REAGAN
WILLIAM N. JENSEN
Attorneys for Defendants
Elva L. Williamson and
James Bowen

[Certificate of Service Omitted in Printing]

DISTRICT COURT—ANSWER OF DEFENDANT LITTLEBIRD

Filed Feb. 10, 1972
[Caption Omitted in Printing]

COMES NOW defendant, Marvin L. Littlebird, and respectfully answers amended complaint of the plaintiff as follows:

I.

Admits the allegations of paragraph I, II, III and the first sentence of paragraph IV and denies the balance of paragraph IV and the Prayer of the Complaint.

II.

DEFENDANT MARVIN L. LITTLEBIRD'S FIRST DEFENSE

Defendant Marvin L. Littlebird alleges that he and others received a vested property right in the coal or other minerals, including oil, gas and other natural deposits of the allotted lands on the reservation herein refered [*sic*] to and that such property right is protected by the Fifth Amendment to the United States Constitution and therefor [*sic*] the Act refered [*sic*] to in plaintiff's complaint as Appendix "A" is wholly ineffectual as to this defendant.

Wherefore, defendant Marvin L. Littlebird demands judgment against plaintiff as follows:

1. That the relief demanded by plaintiff be denied.
2. That it be adjudged and decreed that Marvin L. Littlebird has a vested property right in the coal or other minerals, including oil, gas and other natural deposits of the said Northern Cheyenne Indian Reservation.
3. That defendant have such and further relief as may be just and proper together with any costs and disbursement expended by this action.

/s/ OTIS L. PACKWOOD
OTIS L. PACKWOOD
United States Attorney for the
District of Montana
Attorney for the Defendant,
Marvin L. Littlebird

[Certificate of Service Omitted in Printing]

DISTRICT COURT — PLAINTIFF'S REPLY TO TRIBAL DEFENDANTS' COUNTER-CLAIMS

Filed Mar. 1, 1972
[Caption Omitted in Printing]

COMES NOW the Plaintiff and for its reply to the tribal defendants' counter-claim admits, denies and alleges as follows:

AS TO FIRST COUNTER-CLAIM

FIRST DEFENSE

I.

The said tribal defendants' first counter-claim fails to state a claim upon which relief can be granted.

SECOND DEFENSE

I.

The Court lacks jurisdiction over the subject matter.

THIRD DEFENSE

I.

The Plaintiffs deny each and every allegation contained in paragraphs I, II, and III of the tribal defendants' first counter-claim.

AS TO WHAT IS DESIGNATED AS SECOND COUNTER-CLAIM AND CROSS CLAIM

FIRST DEFENSE

I.

What is designated by tribal defendants as Second Counter-Claim and Cross Claim fails to state a claim upon which relief can be granted.

SECOND DEFENSE

I.

The Court lacks jurisdiction over the subject matter.

THIRD DEFENSE

I.

Deny each and every allegation contained in paragraphs I, II, III, IV, V and VI.

II.

Admit that the Northern Cheyenne tribe is a corporation organized under the act of June 18, 1934, the Wheeler-Howard Act, as alleged in paragraph VI; deny each and every other allegation contained in paragraph VI.

III.

Deny each and every allegation contained in paragraph VIII, IX, X, XI and paragraph II and III of tribal defendants' second counter-claim and cross claim.

WHEREFORE, having fully replied to the tribal defendants' first counter-claim and what is designated as second counter-claim and cross claim, the Plaintiff prays that the said claims be dismissed.

LONGAN & HOLMSTROM
Suite 319 Securities Building
Billings, Montana

BERT W. KRONMILLER
Kronmiller Building
Hardin, Montana
Attorneys for Plaintiff

By /s/ ROBERT HOLSTROM

[Certificate of Service Omitted in Printing]

DISTRICT COURT — AMENDED ANSWER AND COUNTER-CLAIM OF DEFENDANTS WILLIAMSON AND BOWEN

Filed Mar. 2, 1972
[Caption Omitted in Printing]

Comes now the defendants, Elva Littlechief Williamson and James Bowen, to amend their Answer as follows:

By adding the following paragraph entitled Counter-claim to said Answer after paragraph VII thereof.

Counter-claim

1. This claim is brought pursuant to the jurisdiction conferred by the Act of July 24, 1968, Public Law 90-424 but by so doing, defendants do not intend to waive any objections heretofore set out regarding the jurisdiction of this court to hear the above-entitled matter.

2. Defendants, by virtue of a vested property right in the coal or other minerals, including gas and other natural deposits beneath their allotments, claim all right, title

and interest in the proceeds received by the plaintiff from the sale of prospecting permits on April 22, 1971, and in all other monies received by the plaintiff since that date as a result of the sale of further prospecting permits or from the negotiation of mineral leases on said allotments.

WHEREFORE, defendants pray that this court grant the relief requested by the Counter-claim.

By: /s/ THOMAS J. LYNAUGH
THOMAS J. LYNAUGH
BARNEY REAGAN
WILLIAM N. JENSEN
Attorneys for Defendants
ELVA L. WILLIAMSON and
JAMES BOWEN

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DISTRICT COURT–PLAINTIFF'S REPLY TO DEFENDANTS WILLIAMSON AND BOWEN'S COUNTER-CLAIM

Filed Mar. 17, 1972
[Caption Omitted in Printing]

COMES NOW the plaintiff and for its reply to the counter-claim of the defendants Elva L. Littlechief Williamson and James Bowen, admits, denies and alleges as follows:

FIRST DEFENSE

The counter-claim of the said defendants fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The Court lacks jurisdiction over the subject matter.

THIRD DEFENSE

Plaintiffs deny each and every allegation contained in paragraphs 1 and 2 of the said defendants' counterclaim.

WHEREFORE, having fully replied to the counterclaim of the defendants Elva L. Littlechief Williamson and James Bowen, the plaintiff prays that the said claim be dismissed.

LONGAN & HOLMSTROM
Suite 319 Securities Building
Billings, Montana

BERT W. KRONMILLER
Kronmiller Building
Hardin, Montana
Attorneys for Plaintiff

By /s/ ROBERT HOLMSTROM

[Certificate of Service Omitted in Printing]

DISTRICT COURT–ORDER AND MEMORANDUM OPINION DENYING TRIAL DEFENDANTS' MOTION TO ADD UNITED STATES AS CROSS-DEFENDANT

Filed May 30, 1972

[Caption Omitted in Printing]

This case is now before the court on the motion of the tribal defendants represented by Messrs. Brueggemann and

Porter[1] to make the United States of America a party defendant on the cross-claims alleged in their answer, counterclaims, and cross-claims, pursuant to Rules 13(h), 19 and 20 of the Federal Rules of Civil Procedure, and the objection thereto of the United States.

Rule 13(h), as amended in 1966, provides that, "Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20."[2] The joinder of an additional defendant under Rule 13(h) is discretionary rather than compulsory.[3]

In determining whether the United States should now be added as a cross-defendant for the purpose of permitting the defendants to assert their cross-claims, it is necessary to review briefly the history of this litigation.

On July 2, 1970 (almost two years ago) the plaintiff filed a class action pursuant to Public Law 90-424 (82 Stat. 424) to determine whether allottees who receive allotments under the Act of June 3, 1926, as amended, their heirs or devisees, "have a vested property right interest in the min-

1. The tribal defendants represented by Messrs. Brueggemann and Porter have filed a motion, with supporting brief, and an answer asserting a counterclaim, three cross-claims, and one counterclaim and cross-claim. In an amended answer the nontribal defendants have asserted a counterclaim. The defendant Marvin L. Littlebird, a tribal defendant represented by the United States Attorney, has filed an answer.

2. Rule 19 relates to "Joinder of Persons Needed for Just Adjudication" and Rule 20 to "Permissive Joinder of Parties."

3. Under the 1966 Amendment the words "the court shall order" were "replaced by the more flexible standard that persons 'may be made parties', which clearly gives the court discretion to decide whether or not to add a party." 6 Wright & Miller, Federal Practice and Procedure § 1434, p. 186. This is apparently recognized by defendants. They state in their brief that, "Cross-claims (presumably those against additional parties) are not compulsory but permissable."

erals which is protected by the Fifth Amendment."[4] Responsive pleadings have now been filed, and the case is at issue with respect to the present parties.

In order and memorandum opinion entered September 30, 1971 the court ruled that:

(1) The United States is not an indispensable party defendant, as the nontribal defendants contend;

(2) The United States should not be joined as an involuntary plaintiff, as contended by the tribal defendants represented by Messrs. Brueggemann and Porter;

(3) This is a proper class action; and

(4) The court has jurisdiction.

In addition the court decided several motions and petitions for temporary restraining orders and preliminary injunctions seeking to enjoin plaintiff from receiving or exercising any control over the proceeds of the sale of prospecting permits pending the outcome of the litigation.

In an order entered January 12, 1972 the court held that:

(1) The representative defendants and their counsel will fairly and adequately represent the interests of the entire class, including both members and nonmembers of the tribe; and

(2) The notice given to the defendants was adequate for the protection of all members of the class and the fair

4. Public Law 90-424, approved July 24, 1968 amended section 3 of the Act of June 3, 1926 (44 Stat. 690), as amended by the Acts of July 24, 1947 (61 Stat. 418), and September 22, 1961 (75 Stat. 586), to reserve in perpetuity the minerals underlying the Northern Cheyenne Reservation for the benefit of the Tribe. Under prior acts the minerals would become the property of the allottees, their heirs and devisees, in 1976.

conduct of the action and meets the requirements of due process.

In addition, the court denied the motion of the defendants Williamson and Bowen to amend the September 30, 1971 order to permit them to take an interlocutory appeal on the issues of whether the United States is an indispensable party and whether the federal court has jurisdiction. As stated in the January 12, 1972 opinion, the case is not complicated. Aside from the cross-claims it involves a single legal issue.

Through their cross-claims defendants seek a judgment (1) declaring that the defendant allottees, their heirs and devisees, have a vested property right in the minerals which is protected by the Fifth Amendment to the Constitution of the United States,[5] that they are entitled to all monies heretofore collected from the sales of prospecting permits, leases and other income, and that Public Law 90-424 is null and void; and (2) that the plaintiff Tribe pay over all monies it has received and the United States pay over all monies which it holds, and that both be enjoined from entering the allotted lands without defendants' permission. In addition, defendants seek special and general damages under the Federal Tort Claims Act and Tucker Act, together with costs and attorney fees.

As noted supra, the question of whether a defendant should be added under Rule 13(h) is discretionary with the court. Likewise, under Rule 23(d) the court is given a broad discretionary power over the conduct and manage-

5. Defendants contend, inter alia, that Section 3 of the Act of June 3, 1926 "referred *not to* the plaintiff in this action but to the recognized Natural Band or tribe of North American aborigines collectively who are, after all, the *defendants in this action*."

ment of class actions. In concluding that the present motion should be denied the court has considered the following factors:

(1) From the outset of this litigation the court and counsel for all parties have recognized that there must be adequate representation of the class, as well as each subclass, by qualified counsel. The delay in the preliminary stages was due in large part to resolving questions relating to the adequacy of the representation of all persons, both members and nonmembers of the Northern Cheyenne Tribe, who would be affected by the judgment in this case. Initially it was uncertain also whether the United States would represent any of the defendants.

An appearance was entered on November 17, 1971 by the United States Attorney on behalf of Marvin L. Littlebird, a member of the plaintiff tribe, upon this defendant's specific request. This representation was considered by the court in determining in the January 12, 1972 order that all members of the class, and each subclass, are adequately represented.

Obviously it would be impossible for the United States Attorney to represent the United States on the cross-claims and continue his representation of the defendant Littlebird. To allow joinder of the United States would create a conflict of interest[6] and possibly destroy the adequacy of representation of the defendant class.

(2) The complaint, in an action expressly authorized by Congress, raises a single legal question, i.e., whether

6. See Rincon Band of Mission Indians, etc. v. Escondido Mutual Water Company, et al, 9 Cir. No. 26124, decided April 19, 1972, and cases there cited.

the defendants have a vested property right in the minerals under the Act of June 3, 1926, as amended, under which the mineral [*sic*] would become the property of the allottees, their heirs and devisees, in 1976. The cross-claims raise a second legal issue, i.e., whether the defendants have a vested property right in the minerals prior to 1976. Both legal issues may be determined in the present action without adding the United States as a party.

If the defendants should prevail on the second issue, either in this court or the appellate courts, further litigation will of course be required to resolve questions involving funds heretofore collected and paid to the plaintiff Tribe or held by the United States. The court sees no reason for attempting to resolve these questions at this time. It does not appear that a determination of the two legal issues will involve any factual dispute. The parties should be able to agree upon a pretrial order containing stipulated facts and a statement of the legal issues presented, with a provision that none of the parties waive any of the defenses heretofore asserted in pretrial motions.

IT IS ORDERED:

(1) The motion to make the United States a party defendant to the cross-claims is denied;

(2) The parties will attempt to agree upon a pretrial order prior to further hearing on Friday, June 2, 1972, at 1:30 P.M.

Done and dated this 30th day of May, 1972.

/s/ W. J. JAMESON
United States District Judge

DISTRICT COURT—PRE-TRIAL ORDER

Filed July 10, 1972

[Caption Omitted in Printing]

1. It is stipulated between the parties hereto that the execution of this pre-trial order will not constitute a waiver of any of the defenses heretofore asserted in pre-trial motions nor a waiver by the plaintiff of its right to contest the jurisdiction of the Court over the counter claims of the defendants.

2. *AGREED FACTS* The following facts are true and require no proof:

The Northern Cheyenne Tribe of Indians was a recognized natural band of North American aborigines and by executive order dated November 26, 1884 President Chester A. Arthur created a reservation for said tribe or band of Indians, a copy of said executive order is attached hereto labeled Exhibit "A".

The boundaries of the reservation set aside for the Northern Cheyenne Tribe were enlarged by executive order of President William McKinley dated March 19, 1900, a copy of said executive order being attached hereto labeled Exhibit "B".

That the members of the defendant class and the individually-named defendants received their allotments pursuant to the act of June 3, 1926 (44 Stat. 690).

That the Northern Cheyenne Tribe elected to obtain a charter under the act of June 18, 1934 (48 Stat. 984) as amended by the act of June 15, 1935 (49 Stat. 378) and is a recognized Indian tribe organized under a constitution

and by-laws ratified by the tribe on November 2, 1935 and approved by the Secretary of Interior of the United States on November 23, 1935 and amended by ratification by the Tribe on April 12, 1960 and approved by the Secretary of Interior of the United States on July 8, 1960. That attached hereto labeled Exhibit "C" is a copy of said charter.

That the allotment act of 1926, the act of June 3, 1926 (44 Stat. 690) was amended by the enactment of Public Law 90-424, approved by the President on July 24, 1968 (82 Stat. 824 [*sic*], 425); attached hereto labeled Exhibit "D" is a copy of said Public Law 90-424.

That this action was instituted by the Plaintiff pursuant to Public Law 90-424, on the 2nd day of July, 1970.

That the Plaintiff has in the past entered into oil and gas leases, coal permits and coal leases covering the minerals located in and under the allotments of the class of defendants; that the plaintiff has received sums of money for the execution of said leases, for the delay rentals and advance royalties, the exact sum received by the plaintiff is not presently available to the parties; that the lessees and permittees, pursuant to said leases and permits, have gone upon the lands contained in the leases and permits and have explored for mineral deposits by the way of drilling in search of oil and gas and drilling in search of coal deposits; that said lessees and permittees have, in their drilling operations, disturbed the surface of the ground and have removed certain samples of the soil and of the mineral deposits; that there has been no production of oil and gas or coal from said lands.

3. *CONTENTION OF THE PARTIES*

Plaintiff's contentions:

1. The plaintiff contends that the defendants and their predecessors in interest did not receive a vested property right in the minerals in and under their respective allotments which is protected by the Fifth Amendment to the Constitution of the United States;

2. The Plaintiff further contends that it is entitled to the monies received for execution of leases, delay rental payments and advance royalties from leases and permits executed by it covering the minerals in and under the allotments of the defendant class and that its lessees and permittees have a right to go upon the surface of the allotments of the defendant class and use so much of the surface as is necessary for the exploration of mineral deposits without being guilty of tresspass [*sic*] or subjecting the plaintiff to liability for permitting the said lessees and permittees to go upon the surface of the allotments of the defendant class.

Defendant's contentions:

1. The defendants contend that they and their predecessors in interest received a vested property right in the minerals, including oil and gas and other natural deposits, in and under their allotted lands by the enactment of the act of Congress, June 30, 1926 (44 Stat. 690) which is protected by the Fifth Amendment to the Constitution of the United States.

2. Defendants contend that they are entitled to all monies had and received by plaintiff from the sale of all leases and permits and from delay rental and advance royalty payments pursuant to said leases and permits per-

taining to the minerals in and under the allotments of the defendant class.

3. The defendants contend that they are entitled to damages for damage done to the surface of their allotments by permittees and lessees pursuant to permits and leases entered into by the plaintiff and are entitled to have an injunction enjoining the plaintiff and its permittees and lessees from entering upon the surface of the allotments belonging to the defendant's [*sic*] class for the purpose of exploring for mineral deposits.

4. *LAW PROBLEMS*

The parties agree that the trial of this cause, including the issues raised by the counter-claims of the defendants, would be extremely time consuming and expensive because of the necessity of submitting proof relative to the amount of money received by the plaintiff tribe from leases and permits on each individual allotment and proof relative to the alleged damage sustained by each individual defendant because of the activities of the permittees and lessees of the plaintiff upon each individual allotment.

The parties agree, in order to conserve the time of the Court and of the parties, to submit to the Court for its determination, prior to trial, the following issues:

1. Whether or not the defendants and their predecessors in interest received a vested property right in the minerals in and under their respective allotments which is protected by the Fifth Amendment of the United States Constitution by virtue of the Act of June 3, 1926 (44 Stat. 690) as amended;

2. Whether or not the defendant class is entitled to the

revenues received by the plaintiff by virtue of the execution of leases and permits covering the minerals in and under their respective allotments;

3. Whether or not the plaintiff is liable to the defendants for damages done to the surface of their respective allotments by the permittees and lessees of the plaintiff in exploring for mineral deposits in and under said allotments;

4. Whether or not the defendants are entitled to an injunction to enjoin the plaintiff and its permittees and lessees from going upon their respective allotments for the purpose of exploring for mineral deposits.

The parties further agree that these issues may be submitted to the Court upon the agreed statement of facts, hereinabove set forth, and upon briefs of the respective parties.

DATED this 2nd day of June, 1972.

Lewis E. Brueggemann and Marion B. Porter
456-8 Hart-Albin Building, Billings, Montana
By /s/ LEWIS E. BRUEGGEMANN

Longan & Holmstrom
Suite 319, Securities Bldg., Billings, Montana
By /s/ ROBERT HOLMSTROM

Thomas J. Lynaugh
Big Horn Co. Courthouse, Hardin, Montana
By /s/ THOMAS J. LYNAUGH

Otis L. Packwood, United States Attorney
Federal Building, Billings, Montana

By /s/ OTIS L. PACKWOOD

Bert W. Kronmiller
314 North Custer Avenue, Hardin, Montana

By /s/ BERT W. KRONMILLER

Approved this 10th day of July, 1972.

/s/ W. J. JAMESON
United States District Judge

[Exhibit A to Pre-Trial Order—The Executive Order of November 26, 1884—Omitted in Printing (*see* Petitioner's Brief at A-7-8).]

[Exhibit B to Pre-Trial Order—The Executive Order of March 19, 1900—Omitted in Printing (*see* Petitioner's Brief at A-8-9).]

[Exhibit C to Pre-Trial Order—Corporate Charter of Northern Cheyenne Tribe—Omitted in Printing. (*see* Respondent's Brief at 1c-7c).]

[Exhibit D to Pre-Trial Order—1968 Amendment to Northern Cheyenne Allotment Act—Omitted in Printing (*see* Petitioner's Brief at A-6-7).]

DISTRICT COURT — ORDER DENYING MOTIONS FOR NEW TRIAL OR TO AMEND JUDGMENT*

Filed Nov. 28, 1972

[Caption Omitted in Printing]

Counsel for all of the named defendants have filed motions for a new trial or to amend the judgment. Prior to entry of its order of September 29, 1972, the court con-

*The final Order and Opinion of the District Court is printed in the Petition for Writ of Certiorari at A-12-29; the final Judgment is printed therein at A-36-37.

sidered all of the statutes, treaties, executive orders, and cases cited in support of the motions and ruled against defendants' contentions.

Nothing has been presented to persuade the court to modify its conclusions. On the contrary, the court finds support in the per curiam opinion of the United States Supreme Court in United States v. Jim, No. 71-1509, and Utah v. Jim, No. 71-1612, 41 L.W. 3285, decided November 20, 1972. The Court held that a 1933 statute (47 Stat. 1418) conferring oil and gas royalties on Indians residing on the Aneth extension of the Navajo Reservation "did not create constitutionally protected property rights" in the beneficiaries of the Act and upheld a 1968 Act (82 Stat. 121) enlarging the class of beneficiaries to include the entire Navajo tribe residing in San Juan County, Utah.

Defendants Williamson and Bowen, noting the similarity between the 1933 statutory grant to the residents of the Aneth extension and the 1926 Act upon which the defendants here rely, urged this court to follow the opinion of the Utah District Court (unreported) holding that the 1933 Act vested property rights in the Aneth extension residents and that the 1968 Act was unconstitutional.

The Supreme Court reversed. Following Gritts v. Fisher, 224 U.S. 640 (1912), the Court concluded:

> "Congress has not deprived the Navajo of the benefits of mineral deposits on their tribal lands. It has merely chose to re-allocate the * * * royalties * * * in a more efficient and equitable manner. This was well within the power of Congress to do. As no 'property,' in a Fifth Amendment sense, was conferred upon residents of the Aneth extension by the 1933 Act,

no violation of the Fifth Amendment was effected by the 1968 legislation."

The motions for a new trial or to amend the judgment are denied.

Done and dated this 28th day of November, 1972.

/s/ W. J. JAMESON
United States District Judge

NINTH CIRCUIT COURT OF APPEALS — ORDER RECALLING MANDATE AND GRANTING LEAVE TO FILE UNTIMELY PETITION FOR REHEARING.*

Filed Feb. 28, 1975

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-1545

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,
v.
NORTHERN CHEYENNE DEFENDANT CLASS OF ALLOTTEES, HEIRS AND DEVISEES,
Defendant-Appellant.

No. 73-1546

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,
v.
ELVA L. LITTLECHIEF WILLIAMSON AND JAMES BOWEN,
Defendants-Appellants.

No. 73-1547

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,
v.
MYRON L. LITTLEBIRD,
Defendant-Appellant.

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*The Opinion of the Ninth Circuit Court of Appeals is printed in the Petition for Writ of Certiorari at A-1-11; the Judgment is printed therein at A-33-34.

ORDER

Before: WRIGHT and CHOY, Circuit Judges, and PALMIERI,* District Judge.

(1) The mandate heretofore issued herein is recalled.

(2) The late filing of the petition for rehearing of the Northern Cheyenne Tribe is permitted and the petition for rehearing shall be filed within 14 days from the date of filing of this order.

(3) The petition for rehearing may be of a length not to exceed 25 pages of standard typographic printing or 30 pages of printing by any other process.

(4) A response if any to the petition for rehearing shall be filed by the appellees herein within 14 days from the date of filing of the petition for rehearing and may be of the same length as authorized for the petition for rehearing.

TO CLERK OF COURT — February 27, 1975
FROM JUDGE CHOY

RE: No. Cheyenne Tribe v. Littlebird, etc.
Nos. 73-1545/1546/1547

I certify that all judges concerned concur in the attached order. The clerk will please file.

/s/ HERBERT Y. CHOY
United States Circuit Judge

*The Honorable Edmund L. Palmieri, Sr. United States District Judge for the Southern District of New York, sitting by designation.

NINTH CIRCUIT COURT OF APPEALS — ORDER DENYING PETITION FOR REHEARING

Filed April 28, 1975

[Caption Omitted in Printing]

Before: WRIGHT and CHOY, Circuit Judges, and PALMIERI,* District Judge.

The panel as constituted in the above cases has voted to deny the petition for rehearing. The petition for rehearing is denied.

TYPICAL ALLOTMENT PATENT

(Plaintiff's Exhibit No. 4)

THE UNITED STATES OF AMERICA

To all to whom these presents shall come, Greeting:

WHEREAS, a schedule of allotments approved by the Secretary of the Interior has been deposited in the General Land Office, whereby it appears that in accordance with the provisions of the Act of Congress of June 3, 1926 (44 Stat. 690), Julia Whistlingelk Whitedirt, an Indian of the Northern Cheyenne Indian Reservation, has been allotted the following-described land as a Homestead:

[Legal Description Omitted in Printing]

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, has allotted, and by these presents does allot, unto the said Indian the above-described land as a Homestead, subject to all the provisions, conditions, limitations and restrictions contained in said Act of June 3, 1926, and hereby declares that it does and will hold the land so allotted in trust for the sole use and benefit of the said allottee, inalienable and nontaxable

*The Honorable Edmund L. Palmieri, Sr., United States District Judge for the Southern District of New York, sitting by designation.

for the period of twenty-five years from date hereof, or until the death of said allottee, and that at the expiration of said period the United States will convey to said Indian or to her heirs, as the case may be, the fee to said land, discharged of said trust and free of all charges or incumbrances whatsoever. Should said Indian die before the expiration of said twenty-five years, then the Secretary of the Interior shall determine the heirs of said Indian and either issue to them a patent in fee for said land, or cause the same to be sold for their benefit as provided by law. There is reserved from the land hereby allotted a right of way thereon for ditches or canals constructed by the authority of the United States. There is also reserved for the benefit of the Northern Cheyenne Indians, all the coal or other minerals, including oil, gas, and all natural deposits in said land. An area not exceeding sixty feet on either side of every section line within the said reservation, dedicated by said Act as public highways whenever and so far as the same may be so declared by the county commissioners of the county in which the same may be situated, is also reserved.

IN TESTIMONY WHEREOF, I, HERBERT HOOVER, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the twenty-second day of September in the year of our Lord one thousand nine hundred and thirty-two and of the Independence of the United States the one hundred and fifty-seventh.

By the President: /s/ HERBERT HOOVER
By /s/ LEAFIE E. DIETZ, Secretary,
/s/ EMMA L. WARREN,
Recorder of the General Land Office

RECORDED: Patent Number 1058516

THE FOLLOWING ITEMS* ARE FROM APPENDIX A OF THE NORTHERN CHEYENNE TRIBE'S PETITION FOR REHEARING IN THE NINTH CIRCUIT COURT OF APPEALS

Filed Mar. 14, 1975

Denied April 28, 1975

LETTER FROM JEROME RED BIRD TO SENATOR THOMAS J. WALSH OF MONTANA, DATED NOVEMBER 25, 1924

(From Appendix A of Petition for Rehearing in Ninth Circuit)

DEPARTMENT OF THE INTERIOR
UNITED STATES INDIAN FIELD SERVICE
Tongue River Agency

Lame Deer, Montana,
November 25, 1924.

Hon. T. J. Walsh,
U.S. Senator,
Washington, D. C.

Dear Senator Walsh:

I received your letter of November 10th, and showed it to various Indians of this reservation. We are all glad that you were re-elected. One thing we can not understand is that we do not have our allotment.

I believe this is one of the last reservations that is unallotted, therefore, I have taken this matter up with various people, in fact, we have talked about it for the last four or five years, and we have finally come to the conclusion to ask you to help us.

*These items are from a manuscript identified as "Legislative File of the Cheyenne Indians" contained in the collection entitled "Thomas J. Walsh Papers" collected in the Division of Manuscripts of the Library of Congress and were duly certified by the Library of Congress.

We have in mind a tentative Allotment Bill, but do you not deem it prudent to have the Indian Office order the Superintendent and about three representative men of this reservation [*sic*] come to Washington and present to you orally, just what is needed here, and then their wants inasmuch as relates to allotment, to be written down and enacted into a law.

It is high time that something is done for the Northern Cheyenne Indians. We want to be abreast of times, we want to do what is right, in fact, to quote the last paragraph of your letter.

> "Strive at all times to render unto others equal and exact justice, and improve our condition and make us worthy of the high privilege of citizenship."

Kindly let me hear from you as the Indians know as stated in the opening paragraph of my letter that I am in correspondence with you.

Sincerely,

/s/ JEROME RED BIRD

Jerome Red Bird

LETTER FROM SENATOR THOMAS J. WALSH OF MONTANA TO COMMISSIONER OF INDIAN AFFAIRS CHARLES H. BURKE, DATED DECEMBER 2, 1924

(From Appendix A of Petition for Rehearing in Ninth Circuit)

December 2, 1924.

Honorable Charles H. Burke,
Commissioner of Indian Affairs,
Washington, D. C.

My Dear Mr. Commissioner:

The Cheyenne Reservation is the only one in the State of Montana for the allotment of which provision has not been made by Congress. I assume that it is the purpose of your Office to carry out the policy evidenced by recent legislation which has been effective with reference to other Montana Reservations. I see no reason why any exception should be made in the case of the Cheyenne. I had a conference during the month of October with the Committee comprising most of the leading men of the Tribe, who advised me of their desire and the desire of the Tribesmen generally that the Reservation be allotted. Will you have the kindness to write me of your attitute on this matter, and if I have correctly divined it, to send a copy of a bill for introduction.

With kind regards, I am,

Very truly yours,

[File Copy]

LETTER FROM COMMISSIONER OF INDIAN AFFAIRS CHARLES H. BURKE TO SENATOR THOMAS J. WALSH OF MONTANA, DATED DECEMBER 8, 1924

(From Appendix A of Petition for Rehearing in Ninth Circuit)

DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
WASHINGTON

Refer: 87709-24 December 8, 1924.

My dear Senator:

Receipt is acknowledged of your letter of December 2, 1924, in reference to allotting the land of the Tongue River or Northern Cheyenne Indian Reservation in severalty to the Indians.

That question has been before the Office on several previous occasions and was up for consideration only a few months ago. The Indians themselves appear to be divided in their views, some favoring others opposing allotments in severalty. The reservation is generally rough and ninety-five per cent of the land is unsuitable for agricultural purposes, being of value only when used in connection with livestock and grazing industries. The range can be used to much greater advantage by holding it, at least for the present, as tribal property, for the reason that some of the land is adapted to winter grazing and other parts adapted to summer grazing, consequently if it were cut up into allotments very few of the tracts would have adequate water supply and practically none

of them would have grazing for both winter and summer.

In view of these conditions and taking into consideration the needs of the Indians, the conclusion has been reached that it is not advisable to make allotments in severalty on this reservation within the immediate future.

A copy of this letter is inclosed for your convenience.

Cordially yours,

/s/ CHAS. H. BURKE
Commissioner.

Honorable T. J. Walsh,
United States Senate.

[File Copy]

LETTER FROM SENATOR THOMAS J. WALSH OF MONTANA TO JEROME RED BIRD, DATED DECEMBER 13, 1924

(From Appendix A of Petition for Rehearing in Ninth Circuit)

December 13, 1924

Hon. Jerome Red Bird,
Lame Deer, Montana.

Dear Sir:

I am inclosing herewith a letter from the Commissioner of Indian Affairs in reply to my communication to him asking his opinion as to the wisdom of opening the Cheyenne Reservation in the near future. You will appreciate, I am sure, the difficulty, if not the impossibility, of making any headway before Congress on an allotment measure against the opposition of the Indian Bureau. I wish, accordingly, that you would arm me with whatever information you can gather in opposition to the views expressed by the Commissioner in his letter. It might be that thus armed, I could change the views of the Commissioner, or failing in that, prevail upon the Secretary to give his support to the allotment plan.

Very truly yours,

[File Copy]

LETTER FROM NORTHERN CHEYENNE CHIEFS AND HEADSMEN TO SENATOR THOMAS J. WALSH OF MONTANA, DATED FEBRUARY 3, 1925, TRANSMITTING TRIBAL PETITION.

(From Appendix A of Petition for Rehearing in Ninth Circuit)

5-1142

DEPARTMENT OF THE INTERIOR

RE: Allotment of the Northern Cheyennes of the Tongue River Reservation.

UNITED STATES INDIAN FIELD SERVICE

Tongue River Agency.

Lame Deer, Mont.

February 3, 1925.

Hon. T. J. Walsh,
U. S. Senator,
Washington, D. C.

Dear Mr. Walsh:

We transmit herewith a petition signed by all of the people belonging to this reservation that we were able to see in the short time allowed. In fact we encountered no opposition whatever, and they were all in hearty accord with the allotment idea. Also we thought it advisable to get you the following data and reasons for allotment so as to arm you for argument with the Indian Office. We can assure you in advance that all the data contained in our letter is authentic;

No. 1. Present Farm acreage----------20,000
No. 2. Available " " ----------80to 100,000.

Crops raised during the past year:
Tonage of hay---------6,000 Tons.
Oats----------34,200 Bu.
Wheat----------37,456 Bu.
Potatoes----------5,000 Bu.
Corn----------3,000 Bu.

Reimburseable--. The flour mill should be reimbursed from grazing funds instead of robbing the Indians for grinding fee, (this mill was promised by a treaty to the Indians). Approximately $33,000 should have been collected by grinding fee in the last eight years and $9.25 was all that was ever turned in toward this flour mill debt up to the time the present Superintendent came here -January 1, 1924.

The Northern Cheyennes are better prepared to receive allotment than the majority of tribes at the time they were allotted. The reason why we make this statement is the facts to be gathered by the farm reports of the last two or three years which are available for inspection.

Heirship Troubles--. Allotment will enhance permanency of future farm activities, and the enhancement of the Five Year Program will solve the heirship trouble in the matter of probating estates which at present is in a very unsatisfactory and chaotic condition.

By making them an allotment they will make greater efforts to improve both their land and conditions of living and therefore become better citizens.

At the present time and under the present conditions they hesitate to carry out to their full capacity their home building and farm and livestock production, not knowing where the boundaries of their lands are, and also not knowing whether they will ever get any such lands because of this being an Executive Order Reservation, and subject to will of the Congress of our Nation.

All Reimbursable tribal debts for sawmills, steam engines, threshing machines, and gasoline tractors and all other reimbursable tribal implements should be paid from the grazing fund or any other funds that may be to the credit of the Northern Cheyennes, as theses funds become available from time to time.

There is a tribal debt for an irrigation ditch on Tongue River of approximately $140,000, and at the present time the above ditch is useless on account of the need for repairs and as a rough estimate, it will take probably about $25,000 to repair it and make it fit for use.

Along with this ditch debt there is a tribal herd called the RC that was purchased with reimbursable funds about $100,000 and is still a debt against the tribe and at the present there is probably 168 head of cattle left in said herd.

Also besides the Tribal debts above mentioned there is an enormous individual Indian reimbursable debt that is hanging over the Northern Cheyennes.

The debts are due June 30, 1925.

But, as the tribe or the Indians individually are unable to meet there obligations we ask that the two last mentioned tribal debts be cancelled, and an extention of twenty-five years be given the Individual Indians so that they may have time to pay their debts to the Government, through the proceeds of their labor and not by the taking of their tribal resources to be applied on the debt.

Under these circumstances the Government should be protected by making an allotment of lands into severalities to those Indians so that in case of death there may be some collateral available by which the debt may be liquidated for the deceased personal obligations, which heretofore has not been possible. There were Indians who contracted some of the debts and are dead and according to the wording of the contract, their heirs are responsible for the debt, and thus the request for allotment to make this protection for the Government.

Also we wish to advise you that when the Commissioner of Indian Affairs was here in Sept. 1923, he promised us people that he would see that we were allotted, and in conclusion we thank you for your aid in getting us allotted and for Mr. Burke to keep faith with us,

Very truly yours,

Chiefs

Eugene Standing Elk - His
Victor Little Chief
Otis Fingers → Mark

Headsmen

Chas Spotted Elk
John Two Moons
David Little White Man
Rufus Rolling-Bull
Chas Feelbull
John Tallwhiteman

attest

TRIBAL PETITION TO SENATOR THOMAS J. WALSH OF MONTANA, JANUARY-FEBRUARY, 1925, SEEKING ALLOTMENT ACT.

(From Appendix A of Petition for Rehearing in Ninth Circuit)

A PETITION TO

THE HON. T. J. WALSH, U. S. SENATOR

We, the undersigned members of the Northern Cheyenne Indian Tribe, of the State of Montana, do hereby humbly beseech you to do all in your power to have a Bill introduced and passed in Congress, to have an allotment of not less than 320 acres of tillable farm land made to each and every member of the Northern Cheyenne Indians.

To reserve all mineral, timber, and coal lands for the benefit of the Northern Cheyenne Indian Tribe, said tribe to have absolute control of same.

As our Reservation is rather small, and as we understand that the old Fort Keough Military Reservation has been abandoned for military purposes, we ask you to try and have it turned over to the Northern Cheyenne Indians so that we may have enough land to give each member of the tribe the above asked for 320 acres.

Ford Woundedeye

Fred Last Bull

Basil Med Elk

William Russell

Wyles Seminole

Thaddeus Rabbitskin

James Singer Hand

Benton A Lowland

[illegible]

[illegible]

James Walks Last

[illegible]

Ancient Medicine Elk

James One Bear

Jim Medicine Elk

Frank Heart

John Lemonde

Chas White Wisty

Jasper Yellow Robe

[illegible]

George Young Bear
Ben Sings
John Rising Sun
Fred Lumpkin
Wesley L. Whiteman
David Big Foot
August Scalp Em.
Richard Timber Hand
Daniel White Shield
James Fong Jaw
Milton L. Whiteman
Frank Redwoman
D. H. Burns
Louis Lemmick
Fred Russell
Bill Fighting Bear
Frank Yellow Fox
James Big Back
Frank Bear Chief
Robert Red Woman

Jno Nellie Robinson
Mr. Ray Young
Mrs Maggie One Bear
Mrs Mary Spotted Elk
Gertrude Medicine Bird
Alice Rising Sun
Mary Rising Sun
Mrs Chas Hart
Jesse Medicine
Sadie Crazy Mule
Mrs Fred Limpy
Mrs Jas M Robinson
Mr Frank Littlewhiteman
Elmore Timber Hand
Adolph Yellow Robe

William Yellowrobe

Tom Sioux

Jas. Killsback

Chas. Hart

Hattie Curly

Mrs Bearenheart

Mrs Highbear

Sadie Littlewhiteman

Mrs Wesley Mcneil

Sally Harris

John Crazy mule

Chas Little Head

Thomas Curly

Jas. Stanley Bear

Whitedirt

John Chubby

Hershey Wolf chief

Chas. Bigdark

Harold Medicine Elk

George Bigmouth

Risingsun

Chas White Dirty

Edward Harris

John Killsontop

John Big Eagle

Samson Medicine

Alfred Spang

David Sweet Medicine

Mrs David Sweet Medicine

George Americanhorse

Austin Jr, Sr

Thomas Baptiste Horse

James Fisher Jr.

Aaron Littlewhitemen

Nicholas Comeshome

Mrs John Strongarm

John Tackes Sr.

John Badger

Ernest M. Clayens

George Ingram
Chas Eastman
Mrs Chas Parr
Jesse Threefingers
Mrs John Shadhead
Malissa Tucker

Jesse Rigsby
Jennie Bernard
Mrs John Blackwolf
John Tallchief
Mrs John Tallchief
Mrs John Rigsby

Chas Bearshead
Chas. Spottedelk
Chas Blackstone
Jerrell Eagleeffether
Mary Hardcastle
Quit a Texas
Rose Little Whiteman
Mrs Chas Young Bear
Mrs Lettie Woodie
Lucy Big Foot
Mr Brockel Mizel
Flora Dog Chief
Annie Medicine

Walter Little Chief

Willie Ridge Bear

Mrs William Standing

Frank Dance

John Dance

Josie Standing

Grandpa Allison Left

Sallie Bates

Mrs Mattie Russell

Irving Blackbird

Phil Yellow Robe

Joseph Running Elk

Mrs Dolton Little Chief

Mrs Ed. Harris

Arthur Chamberlain

James Wood Packer

Mrs Lew Bird Bear

James Bay Mac
Mrs Bay Mac

Wanda White Wolf

Mrs Lena Maubear
Mrs Lena Whitebird
Mrs Rosa Whitewind
Bessie Chapman

Grover Wolfpaw

Robert J. Cairns

Mrs Ethel Sherman
Mrs Jessie Benson
Jennie Kemp

[illegible]

[illegible]

[illegible]

Mary Parker
[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Joseph Crazyhand
Bert Two Moons
Ed Woman Leggins his
Jennie Woman Leggins mark his
James Rockroad. — Mark
David Dreamy
Richard Walks Last — his Mark
John Little Mouth
James Big Bear
Mack Rock roads
John Strange Owl — Mark

William Little Wolf
his
Jacob Eagle feather Mark
Bert Wild Hog Mark
Elmer Spring Water
Peter Two Bears — his Mark

James Wilson
Stamper & Lite

Mary Eastman
Margaret Eastman
Adeline Eastman
Mr His Bad Horses
Mrs His Bad Horses
Willie His Bad Horses
Ed Bigby
Frances Blackwhitestone
Mrs Blackwhitestone
Mr Blackwhitestone
Mr Alex Brady.
Josephine Brady.

Frank Pine

Mrs Annie Bigleg

Mrs Grasshopper.
Miss Arapahoe chief
Mrs Emma duo moons

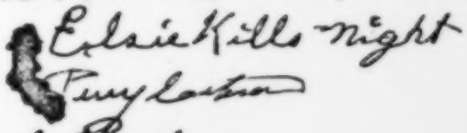
Frank Waters.
Rosa Crook.
John Smith
William Two Moons
Moon Way Road
Alice Yellow Robe.
Fred Ramsdine.
Emma Colhoff.
Frances Two Birds
Nellie Red Leaves

Mrs Fred Ramsdine

Mrs James Bad Boy

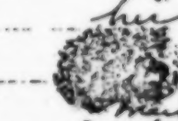
Mrs John Smith

Sarah Prairie bear.



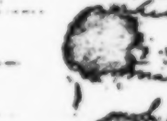
Edgar Kills Night
Tony Eastman
Frank Hart.
of the Bear River
Arthur Shortbull

William Yellowbreast

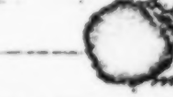


Stanfield Hounds eye
Paul Rednose
Mrs Paul Rednose

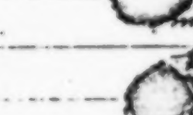
Mrs Arthur Shortbull



Dora Little Hawk.



Bessie Dull Knife



Mrs Ben Limpy

William Redhorses.
Edward Bearquiver

Isaac Grasshopper
Peter Grasshopper
Maud Dagg
Jean Walking Bear
Chas. Walk Bear

Louis Roundstone
Arthur Prairie Bear
Willie Seminole

Oliver Risingsun

Mrs Jean Walking Bird
Seth Walking Bird
Albert Shuler
Minnie Shuler

Mary Hustad Horses
Mrs Bessie Risingsun
James Black Coyote
Little yellow Horse
Wm Braided Locks
Bobbie Braided Locks

Jasper Tall Whiteman
Wm Eagle Bear
Minnie Blindman
John Buffalohorn

Wilson Pine
Mrs John Buffalohorn
Mrs Wilson Pine

James Dagg
Sarah Gray Dog
Fannie Gray Dog
Peter Risingsun

James Deafy
Robert Porcupine
Mrs Philip Risingsun

Mrs Mark Wolfmedo

Robert Little Wolf
Mary Little Wolf

David Little white man.

Paul Little Bear

Paul Shell

Frank Bear chum

Debo Flying

James Hog fisher

Thomas Looks Behind.

Poss Red Top.

John Twobirds

William Redrobe

Cole Hills night

Mr Little wolf

Mrs Little wolf

Miss Little wolf

Eva Little wolf

James Bull

Willie Rising Sun

Jennie Risingsun

John Twomoons

Mrs John Twomoons

Oliver Eaglefeathers

Thomas Whitewind

Floyd Highwalker

Albert Crowe

Stanley Lamewoman.

Robert Ridge Walker

Chas. Yellowrobe

John Teeth

Chas Spotted

Mr Limpy
William Kills Night
Cleas Kills Night
Rosa Kills Night
Chas. Teeth
Mrs Limpy
Mrs Two Birds
Mrs Teeth
Minnie Kills Night
Thomas Medicine Bull
Robert Red Moon
Lizzie Harris
Cub a little bear
Mrs John Teeth
Mrs Many Colt Bull
Young Old Sub

Frank Little Dog
Kate Little Dog

Birney Dist.

1. Robert Standing Elk

2. William Standing

3. Louis Magpie

4. Floyd Fisher

5. Peter Big Head Land

6 Pat Tall whiteman

7 Floyd Clubfoot

8 Ed. Shoulow
David Redneck
John Yo. ung Bird
Charles Lavallee

1 Chester Woodenthigh

2 Red Robe X

3 Mrs. Red Robe X

4 Mary Red Robe +

5 Andrew Whitehawk

6 John Whitehawk

7 Mrs Whitehawk

8 Martin Two Bulls

7 Eleanor Twin

10 Charles Crawling

11 Bessie Two Bulls

12 Ben Shoulderblade
Ed Sitting man
13
14 Louise Big foot.
15 Olive Yellow Eyes
16 Gertrude Yellow Eyes
17 Adam Yellow Eyes.
18 Mrs Adam Yellow Eyes.
19 George White Horse
20 John Red Beads
21 Mrs. Red Beads.
22 Mrs. Hollow Wood

23 Richard Hollow wood.
24 William Yellow Fox
25 Peter Fire Crow
26 Peter Little Bird
27 Rosie Little Bird
28 Hugh White Moon
29 I. W. Wolf
30 mrs Alice White Wolf
31 Charley Little Eagle.
32 Mary Little Eagle.
33 Emilie Little Eagle

34 Joe Brown Bird

35 Mrs. Brown Bird

36 John Two Feathers

37 Mrs Two Feathers

38 Dallas Half Black

39 Rosie wolf Black.

40 H. White Moon.

41 Oliver Sponge

42 Mrs. George Crook.

43 George Crook.

44 Mrs Jennine Foote

45 George Yellow nose

46 Robert Yellow Nose

47 Mrs Annie Yellow Nose

48 Gertrude Yellow Hair.

49 Josephine Yellow fox

50 Ruth Hardrobe

51 L. Little Wolf ind.

52 Richard Wooden Leg.

53 Mrs. Wooden Leg.

54 (Old Lady.) White Hawk.

55 David Tangle Yellowhair

54 Margaret Yellow hair

57 Leo Whitecrow

58 Hugh Spotted Hawk

59 Cecelia Spotted ~~Head~~ Wolf.

60 Lizzie Crazy Medicine

61 Charley white Crow.

62 Bessie Iron Teeth

63 David Walks Carry.

64 Mrs. David Walks Carry.

65 Mary yellow Hair.

66 Franck white wolf.

67 Mrs. Frank white wolf.

68 George Little Whirlwind

69 Mary white Crain

70 Mrs. J. Yellow Hair.

71 Albert ~~H~~ Antelope

72 Eva Howling Antelope

73 Mary Sweet Medicine

74 Marie Sharp nose.

75 Edward Sharp nose

76 William Black Eagle

77 Charley Bear Comesout.

78 Mrs. Ben Comes out.

79 Pat. Spotted Wolf.

80 Mrs. Spotted Wolf.

81 Mrs. Shoulder blade.

82 Alfred Sponge.

83 Bear Coat Leg.

84 Josie Red Neck.

85 Ben Big Head.

86 Clara Big Head

87 Julia Big Head

88 Bigheadmen

89 Mrs. Big Headman.

90 Mrs. Florence Red Bird

91 William Red Bird.

92 Mrs Clara Sponge

93 Mrs. Tangle Horn Elk.

94 Joseph Tangle Horn Elk.

95 Mary Fox.

96 Mrs Threefingers.

97 Gertrude Threefingers

98 Nelson Medicine Bird.

99 Mary Medicine Bird

100 Bryan Harris

101 Henry Standing Elk

102 Mrs Elsie Harris

103 Henry Little Coyote

104 Mrs. Chasing Bear

105 Mrs. Willis Chasing Bear.

104 Mrs. Big Crow.

107 Florence Chasing Bear.

108 Eugene Tangle Yellow hair

109 Chas. Big headman

110 White Big Foot.

111 Willis Chasing Bear

112 arthur Woodenthigh

113 James Twins

114 Bessie Twins

115 Lucy Sitting man.

116 Mary Crawling

117 William Bighead man

118 Agnes Bighead man

119 Mrs. Woodenthigh

120 Henry Whitewolf

121 Chas Lone Wolf.

Otis Fingere — Chief

Colonel Hardrobe — Chief

Agness L. Spang

Carl Wolfrom

Vera Burns

Geo. E. Burns

Geo. Sherman Jr.

Mrs Chas Longjaw

Mrs Frank Redwoman

Mrs Geo Armstrongcane Sr.

Mrs Chas Littlehead

Mrs Amelia Killsback

Mrs Tom Scout

Witnesses

Milton L Whiteman

Alex Spotted Crow

Gross White Crow

Augustus Spotted:

RECEIVED
1975
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-105

THE NORTHERN CHEYENNE TRIBE,

Petitioner,

v.

WILLIAM HOLLOWBREAST, et al.,

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Lewis E. Brueggemann
Attorney for Respondents

Office and Post Office Address:
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SUBJECT INDEX

Page

Introduction 1

Litigation History 1, 2

Opinions Below 2

Pivotal Issue 2, 3

Respondents Position 3

Treaty, Legislative and Historical Background. . . 3, 4, 5

Law and Argument . . . . . 5 thru 14

1. The Act of June 3, 1926 (44 Stat. 690). 6

2. Mineral Rights Not Reserved By The Congress In 1926 Act 6

3. Controlling Case 7, 8, 9

4. Correct Rule of Construction 9

5. 1968 Act Retroactive Legislation (82 Stat. 424, 425) 9, 10

6. Indian Lobbying is Not Indicative of Congressional Intent 10,11, 12

7. Summary 12,13, 14

Conclusion 14, 15

TABLES OF AUTHORITY
Table of Cases

Adams v. Osage Tribe of Indians, 59 F. 2d. 653 (10th Cir. 1932) cert. denied,287 U.S. 652 (1932). .6,7,9,12

Brader v. James, 246 U. S. 88 (1918) 8

British American Oil Producing Co., v. Board of Equalization, 299 U. S. 159 (1936 81 L. Ed. 95, 98 (1937) 6, 13

Butschkowski v. Brecks, 94 Neb. 532, 143 N. W. 923 8

Choate v. Trapp, 224 U. S. 665, 675 (1912) 7, 8,14

Cf. F. H. A. v. Darlington Inc. 358 U. S. 84 (1958) . . 10

Page

Chippewa Indians of Minnesota v. U. S. 301 U. S. 358, 375, 57 S. ct. 833 81 L. Ed. 1156 12

C. I. R. v. Walker, 326 F. 2d. 261, 262 (9th H. Cir. 1964) 7

Danzer Co., v. Gulf R. R. , 268 U. S. 633 (1925) . . . 10

De La Rama S. S. Co., v. U. S. 344 U. S. 386 (1953). . 10

Delaware, The 161 U. S. 459, 474; 16 S. ct. 516; 40 L. Ed. 771 11

Duncan Townsite Co., v. Lane, 245 U. S. 308; 62 L. Ed. 309; 38 S. ct. 99 9

Louisville & N. R. Co., v. Scott, 133 Ky 724; 118 S.W. 990, affd. 219 U. S. 209, 55 L. Ed. 183, 31 S. ct. 171 8

Morrow County Auditor, et al., v. U. S. (1917) 243 Fed. Reporter 854 15

Nobel v. Union River Logging Railroad 147 U. S. 165 (1893) 10

Northern Cheyenne Tribe, The v. Northern Cheyenne Class, et al., No. 73-1545 et al.,505 F. 2d. 268 (1974); 394 F. Supp. 1502 (1972). 2,6,9,11,12

Platt v. Union Pacific Railroad, 99 U. S. 48, 67, 25 L. Ed. 424 11

Perry v. U. S., 294, U. S. 330 (1935) 10

Pronovost v. U. S. 232 U. S. 487, 58 L. Ed. 696, 34 S. ct. 391 8

Shoshone Tribe v. U. S., 299 U. S. 476, 497 57 S.ct. 244, 251, 81 L. Ed. 360. 12

Taylor v. Tayrien, 51 F. 2d 884 (10th cir.1931 et seq.).7,13

Tiger v. Western Investment Co., 221 U. S. 286. 8

U. S. v. Arenas, 158 F. 2d. 730. 14

U. S. v. Creek Nation, 295, U. S. 103, 109-110, 55 S. ct. 681, 684, 790 Ed. 1331. 12

U. S. v. Klamath Indians, 304 U. S. 119, 58 S. ct. 799; 82 L. Ed. 1219 12

U. S. v. Oklahoma Gas & Electric Co., 127 F. 2d. 349, 353-54 (10th cir. 1942) 7

U. S. v. The Schooner Peggy, (U. S.) 1 Cranch 103, 2 L. Ed. 49 8

Page

U. S. ex rel. Turner v. Fisher, 222 U. S. 204, 56 L. Ed. 165, 32 S. ct. 37 9

Wiseman v. Madison Cadillac Co.,191 Ark.1021; 88 S. W. 2d. 1007, 103, A. L. R. 1208 11

Wright v. Vinton Branch of Mountain Trust Bank of Roanoke, 300 U. S. 440 (1937 Brandeis, J.). . . 13

CONSTITUTIONAL PROVISIONS

U. S. Constitution amend. V 1, 2, 3, 5, 7, 14, 15

U. S. Constitution art. 6 8

TREATY

The Treaty with the Northern Cheyenne and Northern Arapho, signed May 10th., 1868 (15 Stat. 655) ratified by Congress July 25th., 1868 and proclaimed August 25th., 1868 3,8,9,10,11,12,13

STATUTES

Act of July 28th., 1968; 82 Stat. 424, 425 (Amendment to 1926 Act). . . . . 1,2,5,9,10,13,14, et seq.

Act of June 3rd., 1926; 44 Stat. 690 Northern Cheyenne Allotment Act. . .1,2,3,4,6,11,12, et seq.

Act of June 2nd., 1924, 43 Stat. 253, (8 U. C. 3) (Citizenship). 4,13

Act of June 18th., 1934; 48 Stat. 934 5,11,13

Amendenment of June 15th., 1935; 49 Stat. 378. 5

Act of March 3rd., 1921; 41 Stat. 1355 (Fort Belknap). . . 7,13

Act of June 4th., 1920; 41 Stat. 751 (Crow) 7,13

Act of June 28th., 1906; 34 Stat. 539 (Osage) 7,13

Act of 1887;(Dawes, General Allotment Act) 24 Stat.388. . . . 4

OTHER AUTHORITY

U. S. Supreme Court Rule 19, 1 et seq. 1

Page

President McKinley's Executive Order of March 19th, 1900 (Kappler, cited pages 860-861). 4,12

A Continent Lost - A Civilization Won, J. P. Kinneys Study 4

History of the Allotment Policy D. C. Otis 4

Attorney General Opinion of (afterward Justice) Stone, rendered May 27th, 1924 4

Petitioners appedix A-49 and A-53 . . . . . .10, 11

Jones on Evidence, 6th Ed., Section 2:22 11

President Chester A. Arthurs Executive Order of November 26th, 1884 (vol. I of Indian Affairs, Law and Treaties, of Charles J. Kappler at page 860.). 4, 12

INTRODUCTION

This opposition is filed in response to the petition for a writ of certiorari filed by the petitioner tribal corporation on or about the 25th., day of July, 1975. Respondents oppose such a review on two counts:

1. The United States Court of Appeals for the Ninth Circuit committed no error; and

2. Since a review on a writ of certiorari,

> ". . . . . is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore . . . . . "

it should be denied. (Rule 19, 1 et seq., emphasis supplied.)

LITIGATION HISTORY

The Northern Cheyenne Tribe., Inc., at the direction of Congress, (Act of July 28th., 1968; 82 Stat. 424, 425) brought this action in the District Court under a special grant of jurisdiction against respondents, individual owners, and class representatives of all allottees, their heirs and devisees, owning allotments of land within the exterior boundaries of the tribal reservation on or about July 2nd., 1970.

At stake are the rights to the mineral deposits contained in and beneath these allotted lands. In 1964, Congress attempted to reserve these deposits in perpetuity for the benefit of the tribal corporation, provided the tribal corporation institute this suit,

> ". . . . To determine whether under the provisions of the Act of June 3rd., 1926 (44 Stat. 690), as amended, the allottees, their heirs or devisees have received a vested property right (in the minerals) which is protected by the Fifth Amendement . . . . . "

to the United States constitution. (Insert supplied;

Act of July 28th., 1968; cited supra.)

The District Court held that no property rights were received and awarded judgment, including all prospecting permit and lease monies, to the tribal corporation on or about September 29th., 1972. Rehearing was denied the respondents on or about November 28th., 1972.

Respondents promptly appealed and the U. S. Court of Appeals for the Ninth Circuit reversed and remanded on October 17th., 1974.

Petitioners, after substitution of counsel, filed an untimely petition for rehearing on February 28th., 1975, with that Court's permission. The petition for rehearing itself however, was denied April 28th., 1975.

The application for a writ of certiorari by petitioners to this high Court followed.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals No.73-1545 is reported at 505 F. 2d 268 (1974); and the opinion of the District Court for the District of Montana is reported at 394 F. Supp. 1502 (1972).

PIVOTAL ISSUE

It is evident that all issues in this cause are collateral, ancillary, and dependent upon one central pivotal issue only, which is; Did the respondent class of Northern Cheyenne Indian allottees, heirs and devisees receive a vested property right in the minerals in and under their respective allotments, which is protected by the Fifth Amendment to the U. S. Constitution, by virtue of the Act of June 3rd., 1926, (44 Stat. 690) as

amended ? It is pristine clear that this is a pure question of law.

RESPONDENTS POSITION

It is the respondents position that they do have a vested property right in the minerals, beneath their allotments by virtue of the Act of June 3rd., 1926, (44 Stat. 690) as amended, protected by the Fifth Amendment to the U. S. Constitution, and/or, also, by virtue of the Treaty of 1868, (15 Stat. 655, cited supra), and further that the Ninth Circuit Court of Appeals was correct in so mandating.

TREATY, LEGISLATIVE AND HISTORICAL BACKGROUND

The natural band or tribe of Northern Cheyenne Indians surrendered and laid down their arms against U. S. Armed Forces, and accepted in return the provisions of "The Treaty with the Northern Cheyenne and Northern Arapaho," signed May 10th., 1868 (15 Stat. 655), ratified by Congress July 25th., 1868, and proclaimed August 25th., 1868. There was offer and acceptance, a meeting of the minds, consideration, there was agreement, and there was a legally valid Treaty. Land, both tribal and allotted was promised to the Northern Cheyenne Indians in this historical document, and the land was designated as a "permanent reservation,"1.and was given to the Indians in return for their surrender of all other claims to all other land and territories.

---

1. "Art. 3. If any individual belonging to said tribes of Indians . . . . . he shall have the privilege to select,. . . . . a tract of land within the reservation not exceeding three hundred twenty acres. . . . but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family. . . . . " (Treaty of 1868 cited supra., emphasis supplied.)

(15 Stat. 655 Art. 2, et seq.)

The Northern Cheyenne reservation was then circumscribed and set out in detail by President Chester A. Arthur's Executive Order of November 26th., 1884. (Vol. I of Indian Affairs, Laws and Treaties, of Charles J. Kappler at page 860.) The reservation was later enlarged by President McKinley's Executive Order of March 19th., 1900 (Kappler, cited supra pages 860-861.)

None of these three aforementioned documents reserved any of the minerals in the allotments to the tribe or to the U. S. Government.

The purpose of the Congress in 1887 when the General Allotment Act,(Dawes Act, 24 Stat. 388.) was passed, was in short to do away with tribal lands and issue a patent in fee to the individual Indians with only a restriction on alienation for 25 years. (Dawes Act, cited supra and J. P. Kinney's Study. "A Continent Lost - A Civilization Won," and also "History of the Allotment Policy," by D. C. Otis.)

On June 2nd., 1924, " A Bill Granting Citizenship to Indians, and for other Purposes,"(43 Stat. 253, 8 U. S. C. 3) passed and removed all doubt that an Indian was entitled to constitutional protection.[2.]

Next followed the Act in question: " An Act to Provide for Allotting in Severalty Lands within the Northern Cheyenne Indian Reservation in Montana, and for Other Purposes," of June 3rd., 1926. (44 Stat. 690.)

---

2. I think nothing makes the intent and motive of Congress more clear, than the opinion of Attorney General (afterwards Justice) Stone rendered on May 27th., 1924, just a few days before citizenship was conferred on the Indian: ". . . . . These treaty provisions for the allotment of reservation lands all contemplate the final passing of a perfect fee title to the individuals of the tribe. And that meant, of course, that the minerals and all other hidden or latent resources go with the fee." (Emphasis supplied.)

This Act which reserved the minerals beneath the alloted lands for a period of 50 years did not refer to the tribal corporation, but rather to the natural band or tribe of Northern Cheyenne Indians.

The natural band or tribe did not become a federal corporation until after the Act of June 18th., 1934 (48 Stat. 934,) as amended by the Act of June 15th., 1935, (49 Stat. 378) and ratified November 7th., 1936.

The enactment of Public Law 90-424 of July 24th., 1968 (32 Stat. 424,425) followed, the discovery of the immense, untapped coal deposit, the constitutionality of which said Act is here in question, which sought to divest the minerals beneath the allotments from the allottees and vest title in perpetuity in the tribal corporation. Respondents content this was an act of naked confiscation.

LAW AND ARGUMENT

The issue which confronted the Circuit Court, and which is now before this high Court, is purely one of law, and most certainly does not involve the National Energy Policy, the survival of the Northern Cheyenne Tribe or any other such absurdity, as petitioner would lead this Court to believe.

The petitioner's argument that the tribe is threatened with extinction, or that the nation energy crises is involved, has little if any basis in fact, and is at best improper judicial forensic argument.[3.]

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3. Approximately 62% of the surface is owned by the tribal corporation. It is the poor, indigent, and defenseless allottees and their allotments who are threatened with extinction here.

1. THE ACT OF JUNE 3, 1926 (44 STAT. 690.)

The Act of June 3rd., 1926 as amended section 3 reads:

> "That the timber, coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved for the benefit of the tribe . . . . . Provided, that at the expiration of fifty years from the date of the approval of this Act the coal or other minerals, including oil, gas and other natural deposits, of said allotments shall become the property of the respective allottees or their heirs . . . . . (emphasis supplied.)

Respondents confidently contend that reasonably prudent english speaking persons everywhere, would agree, just as the Circuit Court mandated, that the language in this critical section of the Act was . . ."simple and plain and its meaning clear to common understanding." (Emphasis supplied; No.73-1545, et al, page 6; 505 F 2d 268; 59 F 2d 654, 655.)

2. MINERALS RIGHTS NOT RESERVED BY THE CONGRESS IN 1926 ACT.

This provision in section 3 of the 1926 Act (cited supra) granting the minerals for a mere term of years to the tribe, with the remainder to the allottees, intentionally omitted any savings clause, reserving clause, or qualifying clause, such as ". . . . . unless otherwise provided for by act of Congress . . . . . " 4.

It had been the policy of Congress in other allotment

4. See Adams vs Osage Tribe of Indians, 59 F. 2d. 653 C. A. 10th., (1932) and see similar phrase "until Congress shall otherwise direct " 41 Stat. 3, 16, 17; and British American Oil Producing Co. vs Board of Equalization, 299 U. S. 159, 164-65 (1936)

statutes, where the lands contained potentially valuable mineral resources, to allot the surface estate while reserving for the tribe for a period of years the minerals beneath these lands, and then qualifying the remainder to further acts of Congress. (E. g., Act of March 3rd., 1921, 41 Stat. 1355 (Fort Belnap Indians); Act of June 4th., 1920, 41 Stat. 751 (Crow Indians); Act of June 28th., 1906, 34 Stat. 539 (Osage Indians.) In each of these prior Acts however, the future interest of the allottees at the expiration of the term fixed was clearly made contingent upon Congress not acting to the contrary. (Adams vs Osage Tribe of Indians, 59 F 2d 653. (10th cir. 1932); Taylor vs Tayrien, 51 F 2d. 884 (10th cir. 1931) et seq.)

Respondents respectfully submit, that petioner's confusion results from his inability or unwillingness, to differentiate between lands held in common by the tribe, and lands held by the allottees, especially as to this intentionally omitted qualifying phrase.(C. I. R. vs Walker, 326 F. 2d. 261, 262 (9th cir. 1964); U. S. vs. Oklahoma Gas & Electric Co., 127 F. 2d. 349, 353-54 (10th cir. 1942).

3. CONTROLLING CASE.

The Circuit Court accurately and properly held the case of Choate vs Trapp, 224 U. S. 665, 675 (1912) as controlling. In that case this high Court considered the nature of the allottee's interest and proclaimed:

> ". . . . . Under the Fifth Amendment there was no more power to deprive (the allottee) of the exemption than any other right in the property. No statute would have been valid which reduced his fee to a life estate, or attempted to take from him ten acres, or fifty, or the timber growing on the land. . . . . If he is bound, so is the tribe and the Government. . . . . " (emphasis supplied.)

(See 224 U. S. at 673-674.)

Petitioners argument that Choate is not controlling in the instant case because the Choate's decision was based on contract, (Atoka Agreement) is also erroneous. Respondents submit that the Act of June 3rd., 1926, (44 Stat. 690) if valid at all, must be predicated upon, and have its legal efficacy derived from the Treaty of 1868, (15 Stat. 655) under which allotments were originally given to individuals.

Courts have repeatedly held that:

> ". . . . . All treaties made or which shall be made under the authority of the United States shall be the supreme law, of the land and the judges in every state shall be bound thereby anything in the Constitution or laws of any state to the contrary not withstanding." (Emphasis supplied.)

Pronovost vs U. S.,232 U. S. 487, 58 L. Ed. 696, 34 S. Ct. 391; U. S. vs The Schooner Peggy,(U. S.) 1 Cranch 103, 2 L. Ed. 49; Louisville & N. R. Co., vs Scott, 133 Ky. 724, 118 S. W. 990, affd. 219 U. S. 209, 55 L. Ed. 183, 31 S. ct. 171; Butschkowski vs Brecks, 94 Neb. 532, 143 N. W. 923, U. S. Const. Art. 6.) Treaties are obviously far more sacred and binding than a mere contract and are the supreme law of the land.

Even petitioners contention that only property rights arising from contract are protected is in error, because the cases cited by him in support of such position do not involve property rights.

(See U. S. vs Jackson, 280 U. S. 183; Brader vs James, 246 U. S. 88; Tiger vs Western Investment Co., 221 U. S. 286; et seq.)

It has also been held that mere enrollment for the purpose of Indian allotments of land concerns property rights and cannot be taken away without notice and opportunity to be heard.

Duncan Townsite Co., vs Lane, 245 U. S. 308, 62 L. Ed. 309, 38 S. Ct. 99; United States ex rel. Turner vs Fisher, 222 U. S. 204, 56 L. Ed. 165, 32 S. Ct. 37.)

4. CORRECT RULE OF CONSTRUCTION.

Petitioners harp that the Circuit Court errored in applying the rule of construction as set out in Adams et al vs Osage Tribe of Indians, (59 F. 2d. 653; C. A. 10th 1932, Cert. den. 287 U. S. 652, 77 L. Ed. 563, 53 S. Ct. 116.

The Court in that case declared:

> "Treaties and legislative Acts relative to Indians should be construed as illiterate people would understand them." (Cited supra)

Certainly, the individual allottees, understood from both the Treaty of 1868, (cited supra) and especially the Act of 1926 (cited supra) that they received allotments of land, and at least under the Act of 1926, that they received minerals at the end of fifty years beneath these allotments. The Circuit Court rightfully found the language,

> ". . . . simple and plain, and its meaning clear to common understanding." (59 F 2d 654,655; 505 F 2d 268)

Petitioners would have this Court do deliberate violence to the plain, clear, concise, simple and direct expressed intent of the Congress, in section 3 of the Act of 1926 to support their contentions. Respondents think not!

5. 1968 ACT RETROACTIVE LEGISLATION 82 STAT. 424, 425

The title vested in the allottees either by virtue of the 1868 Treaty (cited supra) and/or by virtue of the 1926 Act, or both and the Congress clearly attempted to divest it by the

retroactive 1968 Act, (cited supra) which was to give the minerals forever to the tribal corporation. Such legislation that has latent in its design and purpose naked confiscation, political expediency and economical convenience, has been repeatedly held violative of the Fifth Amendment.[5] Nobel vs Union River Logging Railroad, 147 U. S. 165 (1893); Danzer Co., vs Gulf R. R.,268 U. S. 633 (1925) Perry vs U. S. 294 U. S. 330, (1935); De La Rama S. S. Co., vs U. S. 344 U. S. 384 (1953); Cf. F. H. A. vs Darlington, Inc. 358 U. S. 84 (1958.)

Petitioners arguments that the coal is vital to the country degrades this high forum from a fountainhead of justice to a mere political arena of expedience and convenience.

6. INDIAN LOBBYING IS NOT INDICATIVE OF CONGRESSIONAL INTENT.

Petitioner alleges that the evidence of Indian lobbying, (see his appedix A-49 and A-53) documents and letters to and from Senator Thomas J. Walsh to and from the tribal lobbyists, establishes not only the desire of the Northern Cheyenne people, but also the legislative intent of the Congress. Here again, this reasoning lacks reason or substance.

Of the approximately 1,408 enrolled Northern Cheyenne residing on the reservation at the time of the petition was allegedly drafted and executed (the petition itself is undated); only 493 subscribed by signing or making their marks. This number represents a little over one-third of the total number of enrollees, not even a bare majority.

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5. The tribal corporation having slept on their rights for almost fifty years, and after having discovered the vast coal deposit, lobbied Congress for the 1968 Amendment, so that the tribe might conveniently expedite the sale of the coal to the giant coal conglomerates, and thereby eliminate the need to negotiate with the individual Indian allottee.

This can hardly be said to reflect the will of the people.[6] The exhibits do show that the group of lobbyists did want 320 acres per allotment which was interestingly the size of the allotments designated in Article 3 of the 1868 Treaty (cited supra.)

Also interestingly, here again, the allottees were to get the minerals after 50 years. In the final passage of the bill Congress saw fit to grant only 160 acres to each allottee, (Act of 1926, 44 Stat. 690) ignoring the express desire of the lobbyists for 320 acres.

Taking the exhibits at face value in their most favorable interpretation, assuming they are even admissable in evidence,[7] they simply show that a special interest group of Northern Cheyenne Indians lobbied Congress for a bill alloting lands, reserving minerals for fifty years to the natural band, or tribe of Northern Cheyenne Indians collectively, who are the Respondent Class. (The tribe became a federal corporation after Act of June 18th., 1934; 48 Stat. 934.) It therefore, cannot be reasonably maintained that a document subscribed by only 493 Indians or less, of some 1,408 enrollees residing on the reservation, can conclusively establish the understanding that all enrollees had, and certainly not now have, of the 1926 Act, (cited supra)

---

6. In the original exhibits submitted with the petition for rehearing in the Circuit Court, the letter exhibit that accompanied the petition was endorsed by three chiefs, two of which had to make their marks, of the headsmen signing all three had make their marks, and of the total Indians subscribing these documents 227 had to make their marks, also, the same hand penned many of the different signatures. One wonders if they could not write, whether they could read or even understand the document at all.

7. Courts have repeatedly held that the language of a statute must be of an "obscure or doubtful meaning" to warrant an inquiry into legislative history. The meaning of this staute (Act of 1926) is "simple and plain and its meaning clear to to common understanding"(305 F. 2d. 268) (See Wiseman vs Madison Cadillac Co.,191 Ark. 1021, 88 S. W. 2d 1007, 103 A. L. R. 1208; The Delaware 161 U. S. 459, 474; 16 S. ct.516, 40 L.Ed. 771; Platt vs Union Pacific Railroad,99 U. S. 48, 67, 25 L. Ed. 424; Wright vs Vinton Branch of Mountain Trust Bank of Roanoke, 300 U. S. 440 (1937 Brandeis, J.) Jones on Evidence, 6th Ed. Sect.2:22.

which was passed after the fact! ! ! It most assuredly cannot reasonably be maintained that it could possible be interpreted as to reflect the intent of the Congress. I think the reverse is closer to the truth, and that was Congress rejected the efforts of the lobbyists in these certain provisions and saw fit to pass the 1926 Act (cited supra) in its final form.[8.]

7. SUMMARY

1. There can exist no doubt that the rights obtained by the individual Northern Cheyenne Indians in their allotments by the Treaty of 1868 (15 Stat. 655), conveyed both surface and subsurface rights. Failure to reserve the minerals in the alloted lands either to the tribe or to the government, the U. S. conveyed them, and the treaty must be construed against the United States and in the most favorable light to the illiterate Indian Wards. It must be construed liberally for the individual beneficiary allottees. This is also true of the 1926 Act (cited supra; Adams vs U. S. cited supra, et seq.)

2. The Executive Orders of both President Arthur and McKinley circumscribing in detail the reservation and enlarging it was an official recognition of these vested property rights in the allottees.

(Chippewa Indians of Minnesota vs U. S., 301 U. S. 358, 375, 376, 57 S. ct.833, 81 L. Ed. 1156; and United States vs Klamath Indians, 304 U. S. 119, 58 S. ct. 799, 82 L. Ed. 1219; and Shoshone Tribe vs U. S., 299 U. S. 476, 497, 57 S. ct. 244, 251, 81 L. Ed. 360; and U. S. vs Creek Nation, 295 U. S. 103, 109-110, 55 S. ct. 681, 684, 790. Ed. 1331.

---

8. The words of Congress must be taken within their "common understanding" (59 F. 2d 653; and 505 F. 2d 268.)

3. The Northern Cheyenne were granted citizenship by the Act of June 2nd., 1924 (43 Stat. 253) removing all doubt that they were entitled to its constitutional protections.

4. The allotment Act of June 3rd., 1926, (44 Stat. 690) predicated upon, having its legal efficacy derived from the Treaty of 1868, (cited supra) confirmed and further recognized the vested property rights of the allottees, including the minerals, and section 3 thereof, reserving the minerals to the tribe for 50 years was probably in abrogation of the provisions of said Treaty. (In support see cases cited in paragraph two above.)

5. In any event, the minerals were reserved if at all, to the natural band or tribe of Northern Cheyenne Indians, the respondents, and not to the petitioner tribal corporation.[9.]

6. The tribal corporation may be illegally constituted, and may not exist at all, having failed to comply with the provisions of the 1868 Treaty. (15 Stat. 655., Art. 8.)[10.]

The cases of Adams (cited supra) involving the Osage Statute, and of Taylor (cited supra) involving the same Osage Statute, and the case of British-American Oil, involving the Blackfeet Statute, demonstrate that the similar phrases, also found in the Crow Statute, are all absent in the Northern Cheyenne Statute.[11.]

8. Congress explicitly surrenders the decision on the validty of the Act of 1968 and leaves it entirely up to the Courts,[12.]

---

9. The tribe did not incorporate, if at all, until after the Act of June 18th., 1934. (48 Stat. 934.)

10. ". . . . no cession by the tribe shall be understodd or construed . . . . as to deprive without his consent, any individual member of the tribe of his right to any tract of land . . . . . "

11. " . . . . until Congress shall otherwise direct."

12. Act of July 28th., 1968, 82 Stat. 424, 425.

indicating an obvious reservation as in its validity.

9. Congress has unquestionably recognized vested title in the surface and subsurface rights of the allottments which cannot now be taken without just compensation.

10. The intent of Congress at the time of the enactment of 1920 (41 Stat. 690) was to give the allottees a vested property right in the minerals beneath their allotted lands subject only to a term of years. The motive was compel the Indian to follow the whiteman society, and the tribe took nothing, unless it be a term of 50 years merely. (Choate vs Trapp, cited supra).

11. Issuance of fee patents are ministerial acts merely, and are enforceable in the Courts. (United States vs Arenas, 15 8 F. 2d. 730.)

12. There has been a wrongful taking of the vested property rights in the minerals beneath the allotted lands within the meaning of the Fifth Amendment that requires just compensation. The 1968 Act (82 Stat. 424, 425) is retroactive legislation and therefore void and unconstitutional and was an act of deliberate and naked confiscation.

CONCLUSION

The mandate of the Circuit Court must be upheld and the petition for writ of certiorari denied.

Respondents are confident that this High Court will not permit the taking of valuable and unique mineral rights, from the entire class of Northern Cheyenne allottees, heirs and devisees without compensation, thereby degrading and reducing them to something less than American citizens entitled to constitutional protections.

It has been proffered, that, "sharp wits, like sharp knives

do often cut their owners fingers."

Congress in its eagerness to compel the Indian to follow the Whiteman's ways " cut their owners fingers."

> "The government may in its dealings with Indians create property rights which, once vested, even it cannot alter, and such property rights may result from agreements either in the form of a treaty or a statute; the important consideration being that there should be the essentials of a binding agreement between the government and the Indian and the resultant vesting of a property right in the Indian.
> (Emphasis supplied. Morrow, County Auditor, et al., vs U. S. (1917) 243 Fed. Reporter 694.)

Respondents respectfully submit the petition should be denied.

Respectfully submitted,

Lewis E. Brueggeman
Attorney for Respondents

CERTIFICATE OF SERVICE

I, Lewis E. Brueggemann, hereby certify that on the 8th day of August, 1975, I served a copy of the foregoing Opposition To Petition For Writ Of Certitiorari and Affadavit In Support Of The Motion To Appear And Oppose In Forma Pauperis on the attorneys of record for this cause by mailing true and correct copies thereto to said attorneys in an envelope, first class postage prepaid, addressed to them as follows:

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Lewis E. Brueggemann
Counsel for the Northern Cheyenne
Respondent Class

SUBSCRIBED AND SWORN to this 6th day of August, 1975.

Notary Public for the State of
Montana. Residing at Billings,
Montana. My commission expires:
6-7-8-77

(SEAL)

RECEIVED
1975
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-145

THE NORTHERN CHEYENNE TRIBE, Petitioner,

vs.

WILLIAM HOLLOWBREAST, GRACE KINGFISHER, RAYMOND BRADY, SR., KENNETH BEARTUSK, WINONA FOX, BESSIE ELKSHOULDER, NELLIE ROBINSON, RAYMOND HARRIS, SR., DELORES WALTERS MURDOCK, ELVA L. LITTLECHIEF WILLIAMSON, JAMES BOWEN, and MYRON L. LITTLEBIRD, individually and as representatives of all allottees, their heirs or devisees who received allotments pursuant to the Act of Congress of June 3, 1926, as amended, Respondents.

AFFIDAVIT IN SUPPORT OF THE MOTION
TO APPEAR AND OPPOSE IN FORMA PAUPERIS

I, James D. King, Sr., individually and as representative of all allottees heirs and devisees who received allotments pursuant to the Act of Congress of June 3rd., 1926 as amended, and also respondent in this cause, depose and say that I am representative of respondent class, that I am indigent and impoverished as is said class, and that this affidavit in support of the motion to proceed, appear and oppose petitioners application for Writ of Certiorari, in forma pauperis without being required to prepay any fees, costs or of printing of briefs or give security therefore.

I, James D. King, Sr., as representative of respondent class further swear, that the above statements pertaining to said respondent class's ability to pay costs of appearing and opposing the petitioner's application for Writ of Certioari I believe to be true and correct.

I further understand that a willful false statement herein, in this affadavit will subject me to the penalties for purgery.

James D. King Sr.
James D. King, Sr.,

SUBSCRIBED AND SWORN to this 6th day of August, 1975.

(SEAL)

Lewis E. Breeseman
Notary Public for the State of Montana
Residing at Billings, Montana
My commission expires: Sept 25th 1976

Supreme Court, U. S.
FILED
AUG 21 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

****

October Term, 1975

No. 75-145

****

THE NORTHERN CHEYENNE TRIBE,

Petitioner,

-vs-

WILLIAM HOLLOWBREAST, et al.,

Respondents.

****

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI SUBMITTED BY RESPONDENTS WILLIAMSON AND BOWEN

****

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STATE PUBLISHING CO. HELENA, MONT.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE CASE..... 1

ISSUE PRESENTED..... 1

STATEMENT OF FACTS..... 1

REASONS FOR NOT GRANTING JURISDICTION

SUMMARY..... 3

I. The Background Of The Allotment System Clarifies The Nature Of The Rights Involved..... 5

II. Choate v. Trapp Properly Controls The Result Of The Instant Case..... 8

A. Individual Indians Have Constitutional Rights In Individually Owned Trust Allotments According To Choate v. Trapp..... 9

B. Individual Indians Have No Right Or Enforceable Title In TRIBAL Property According To Gritts v. Fisher.....11

C. The Decision In Choate v. Trapp Is Based on Statutory, Not Contractual, Rights.....13

III. The Allottees' Remainder Interest In The Mineral Estate Was Conveyed By The Original Trust Patents.....16

IV. Congress' Authority In Conducting Indians Affairs Does Not Otherwise Permit Divesting Vested Allotment Rights.....19

CONCLUSION.....23

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TABLE OF AUTHORITIES

CASES: Page(s)

Adams v. Osage Tribe, 59 F.2d 653 (10th Cir. 1932).....18

Agua Caliente Band of Mission Indians v. County of Riverside, 306 F.Supp. 279 (C.D. Calif. 1969)..... 4

Allotment Sections on the Fort Belknap Indian Reservation, 55 I.D. 295 (1935).....17

Arenas v. United States, 322 U.S. 419 (1944)..... 6,7,17

Benson Min. & Smelting Co. v. Alta Min. & Smelting Co., 145 U.S. 428 (1892).....17

Board of County Commissioners v. Seben, 130 F.2d 663 (10th Cir. 1941)..... 4

Board of County Commissioners v. United States, 152 F.2d 540 (10th Cir. 1945)..... 4

Board of Commissioners of Tulsa County, Oklahoma v. United States, 94 F.2d 450 (10th Cir. 1938)..... 4

Brader v. James, 246 U.S. 88 (1918).....15,21

Bryan County, Oklahoma v. United States, 123 F.2d 782 (10th Cir. 1941)..... 4

Carpenter v. Shaw, 280 U.S. 363 (1929)..... 4,15

Chase Jr., v. United States, 256 U.S. 1 (1921).....19

Choate v. Trapp, 224 U.S. 665 (1912)..... 1,3,4, 8,9,10,11,12,13,14, 15,16,17,20,21,23

Choctaw Nation v. United States, 100 F.Supp. 318 (Ct.Cl. 1951)..... 4

County of Mahnomen v. United States, 319 U.S. 474 (1943)..... 4

English v. Richardson, 224 U.S. 680 (1912)..... 4,8,14, 15

Fish v. Wise, 52 F.2d 544 (10th Cir. 1931), cert. denied 282 U.S. 903 (1931)..... 7

Glacier County, Montana v. United States, 99 F.2d 733 (9th Cir. 1938)..... 4

Gleason v. Wood, 224 U.S. 679 (1912)..... 4

Goat v. United States, 224 U.S. 458 (1912).....21,22

Gritts v. Fisher, 224 U.S. 640 (1912)..... 6,9,11, 12,19,20

CASES: (cont.) Page(s)

Heckman v. United States, 224 U.S. 413 (1912)..... 7,21,22

Kirkwood v. Arenas, 243 F.2d 863 (9th Cir. 1957)..... 4

Lane v. Santa Rosa, 249 U.S. 110 (1919).....23

Landman v. Comm'n Internal Revenue Service, 123 F.2d 787 (10th Cir. 1941)..... 4

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).....16

Lowe v. Fisher, 223 U.S. 95 (1912).....20

McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973).....10

McIntire v. United States, 22 F.Supp. 316 (D. Mont. 1936)..... 4

Morrow v. United States, 243 F. 854 (8th Cir. 1917)..... 4

Mott v. United States, 283 U.S. 747 (1931)..... 4,7,17

Nadeau v. Union Pacific Railroad, 253 U.S. 442 (1920).....19

National Indian Youth Council v. Bruce, 366 F.Supp. 313 (N.D. Utah 1973).....16

Nicodemus v. Washington Water and Power Co., 264 F.2d 614 (9th Cir. 1959).....16

Northern Cheyenne Tribe v. Northern Cheyenne Defendant Class of Allottees, Heirs and Devisees, 505 F.2d 268 (9th Cir. 1974)..... 1,3

Northern Cheyenne Tribe v. William Hollowbreast, 349 F.Supp. 1302 (D. Mont. 1972)..... 1,3,10

Oklahoma Tax Comm'n v. United States, 319 U.S. 598 (1943)..... 4

Payne v. New Mexico, 255 U.S. 367 (1921)..... 7

Raymond Bear Hill, 52 I.D. 688 (1929)..... 7,17,18

Rights of Indians to Allotments in San Juan County, Utah, 57 I.D. 547 (1942)..... 7,17

St. Marie v. United States, 108 F.2d 876 (9th Cir. 1940) Cert. denied 311 U.S. 652 (1940)..... 7

Sizemore v. Brady, 235 U.S. 441 (1914)..... 4,19

Stephens v. Cherokee Nation, 174 U.S. 445 (1899).....20

Sweet v. Schock, 245 U.S. 192 (1917).....22

Taunah v. Jones, 90 F.Supp. 459 (W.D. Okla. 1950)..... 4

Thomas v. Gay, 169 U.S. 214 (1898).....16

CASES: Page(s)

Tiger v. Western Investment Co., 221 U.S. 286 (1911)....15,21,22

United States v. Arenas, 158 F.2d 730 (9th Cir. 1946) Cert. denied 331 U.S. 842 (1947)..... 7

United States v. Bartlett, 235 U.S. 72 (1914).....22

United States v. Benewah County, Idaho, 290 F. 268 (9th Cir. 1923)..... 4

United States v. Chase, 245 U.S. 89 (1917).....20

United States v. Ferry County, Washington, 39 F.Supp. 1007 (E.D. Wash. 1941)..... 4

United States v. Ferry County, Washington, 24 F.Supp. 399 (E.D. Wash. 1938)..... 4

United States v. Jackson, 280 U.S. 183 (1930).....15,21

United States v. Jim, 409 U.S. 80, reh.den. 409 U.S. 1118 (1972)..... 6,19

United States v. Nez Perce County, 95 F.2d 232 (9th Cir. 1938)..... 4

United States v. Powers, 16 F.Supp. 155 (D. Mont. 1936)..... 4

United States v. Rowell, 243 U.S. 464 (1917).....19

United States v. Spaeth, 24 F.Supp. 465 (D. Minn. 1938)..... 4

United States v. 2,005.32 Acres of Land, etc., 160 F.Supp. 193 (N.D.So.Dak. 1958).....16

United States v. White, 508 F.2d 453 (8th Cir. 1974).....16

Wallace v. Adams, 204 U.S. 415 (1907).....20

Ward v. Love County, 253 U.S. 17 (1919)..... 4,14,15

Williams v. Johnson, 239 U.S. 414 (1915)..... 4,22

Williams v. Lee, 358 U.S. 217 (1959).....10

Worcester v. Georgia, 6 Pet. 515 (1832).....10

Wyoming v. United States, 255 U.S. 489 (1921).....17

CONSTITUTION:

U.S. Const. Art. 1 Sec. 10.....13

U.S. Const. Amend. V..... 1,9,13, 14

STATUTES: Page(s)

Act of Feb. 8, 1887, 24 Stat. 388..... 6,7,8

Act of June 28, 1906, 34 Stat. 539.....18

Act of May 29, 1908, 35 Stat. 460.....18

Act of June 30, 1919, 41 Stat. 17.....18

Act of June 4, 1920, 41 Stat. 751.....18

Act of March 3, 1921, 41 Stat. 1355.....18

Act of June 3, 1926, 44 Stat. 690..... 2

Act of March 3, 1927, 41 Stat. 1401.....18

Act of June 18, 1934, 48 Stat. 984..... 8,17

Act of July 24, 1968, 82 Stat. 424..... 2,10

OTHER AUTHORITY:

25 C.F.R. 121..... 8

Cohen, F. Handbook of Federal Indian Law (1940)..... 5,6,14

Defendants Williamson and Bowen's Brief in Opposition to the Petition for Rehearing.....16,21

H.Rep.No. 383, 69th Cong. 1st Sess.....18

Kinney, J., A Continent Lost - A Civilization Won, (1937)..... 6

Otis, D.S., History of the Allotment Policy, at Hearings, Committee on Ind. Aff. 73rd Cong. 2d Session on H.R. 7902 (1934)..... 6

Petition for Rehearing (to the Ninth Circuit).....18

Petition for Writ of Certiorari..... 2,3,5, 11,13,17,19, 23

Reply Brief of Appellants Williamson and Bowen (to the Ninth Circuit).....10

S.Rep.No. 638, 69th Cong. 1st Sess.....18

Supreme Court of the United States Rules, Rule 19..... 3

STATEMENT OF THE CASE

The Northern Cheyenne Tribal Business Council initiated this suit to quiet title of the mineral estate for a portion of the Northern Cheyenne Indian Reservation. The tribal council sued its individual Indian constituents to divest their interest in such minerals.[1] The trial court held in favor of the tribal council,[2] but the U.S. Court of Appeals for the Ninth Circuit reversed, holding the individual Indians have a vested interest in the mineral estate underlying their individually owned property. This appeal followed the Ninth Circuit's decision.

ISSUE PRESENTED

Did the Ninth Circuit err in reaffirming this Court's landmark ruling in Choate v. Trapp, 224 U.S. 665 (1912), that individual Indians' property rights in their individually owned allotments (homesteads) are protected against divestment by the Fifth Amendment due process clause?

STATEMENT OF FACTS

From the late 1880's to 1934 Congress' primary policy toward Indians was to divide communally held tribal property into tracts

[1] The Northern Cheyenne Tribe v. William Hollowbreast, 349 F.Supp. 1302 (D. Mont. 1972).

[2] The Northern Cheyenne Tribe v. Northern Cheyenne Defendant Class of Allottees, Heirs and Devisees, 505 F.2d 268 (9th Cir. 1974).

for individual ownership by the individual tribal members. This transfer of land to individual Indian ownership is known as the allotment system. On June 3, 1926 the President signed a bill implementing this allotment system on the Northern Cheyenne Indian Reservation. Pursuant to this statute the individual tribal members received a parcel of land as their "homestead" or allotment. The allotment act also provided for the mineral estate to be held for communal tribal use for fifty years, then to pass to the allottees of the surface. The allottees' interest (here at issue) arises from this provision of the act which provides:

> "Sec. 3. That the timber, coal, or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved for the benefit of the tribe and may be leased with the consent of the Indian council under such rules and regulations as the Secretary of the Interior may prescribe: Provided, That at the expiration of fifty years from the date of the approval of this Act the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall become the property of the respective allottees or their heirs. Provided further, That the unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians." Act of June 3, 1926, 44 Stat. 690. (emphasis added)

This gave the allottees a vested remainder interest in the mineral estate following the tribe's estate per term of fifty years.

During the late 1960's several coal companies began prospecting on the Northern Cheyenne Indian Reservation in search of low sulfur coal. Such coal was found. Of course, negotiating leases with one entity - the tribal business council - would be much easier than negotiating such leases with numerous Indian allottees. Congress passed a bill divesting the allottees of their mineral estate and transferring such minerals to tribal council ownership.[3] By passing

[3] Act of July 24, 1968, 82 Stat. 424. See Petition for Writ of Certiorari p. A 44-45 for the text.

this law, Congress served to facilitate such commercial expedience.[4]

This suit arose as a result of this transfer of the mineral estate to test the constitutionality of such divestment. The trial court held in favor of the tribal business council.[5] The Ninth Circuit reversed, ruling the 1968 amendment violated the Fifth Amendment due process clause as a taking of property without compensation.[6] This appeal followed.

REASONS FOR NOT GRANTING JURISDICTION

SUMMARY

This Court will not grant jurisdiction to hear a review on certiorari unless a U.S. Court of Appeals:

> "...has decided an important question of federal law which has not been, but should be, settled by this Court; or has decided a federal question in a way in conflict with applicable decisions of this court...."[7]

The Ninth Circuit's opinion below does not fall into either category. Rather, the opinion below rests squarely upon this Court's mandate in Choate v. Trapp, 224 U.S. 665 (1912) which has been consistently and correctly adhered to in many subsequent opinions, including at least twenty-seven federal court decisions

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[4] Petition for Writ of Certiorari at 9.

[5] The Northern Cheyenne Tribe v. Hollowbreast, et al., 349 F.Supp. 1302 (D. Mont. 1972).

[6] The Northern Cheyenne Tribe v. Northern Cheyenne Defendant Class of Allottees, Heirs and Devisees, 505 F.2d 268 (9th Cir. 1974).

[7] Supreme Court of the United States Rules, Rule 19(b).

and nine U.S. Supreme Court decisions![8**] In short, Indian allottees' constitutionally protected property rights in their individually owned allotments have been judicially established, consistently reiterated and entrenched in the decisions of this Court such that no legitimately substantial challenge may now be raised. (See n. 8.) The Ninth Circuit's opinion below simply reaffirmed this established rule of law. Consequently, this Court should not grant jurisdiction to rehash the perfectly sound principles established in Choate v. Trapp.

Further, this decision will not vitally affect the survival of the Northern Cheyennes. This case will not decide whether the coal is mined.[9] Rather, this case only decides whether the rightful

[8**] Among the cases expressly agreeing with Choate's, Constitutional protection of individual Indian's property rights are: Supreme Court - Oklahoma Tax Comm'n. v. United States, 319 U.S. 598, 603 (1943); County of Mahnomen v. United States, 319 U.S. 474, 476 (1943); Mott v. United States, 283 U.S. 747, 752 (1931); Carpenter v. Shaw, 280 U.S. 363, 365, 366 (1929); Sizemore v. Brady, 235 U.S. 441, 449 (1914); Ward v. Love County, 253 U.S. 17, 20, 21 (1919); Williams v. Johnson, 239 U.S. 414, 419 (1915); Gleason v. Wood, 224 U.S. 679 (1912); English v. Richardson, 224 U.S. 680 (1912) - Court of Appeals - United States v. Benewah County, Idaho, 290 F. 268 (9th Cir. 1923); Kirkwood v. Arenas, 243 F.2d 863, 869 (9th Cir. 1957); Morrow v. United States, 243 F. 854, 856 (8th Cir. 1917); Board of County Commissioners v. United States, 152 F.2d 540, 542 (10th Cir. 1945); Board of County Commissioners v. Seben, 130 F.2d 663, 668 (10th Cir. 1941); Landman v. Comm'n Internal Revenue Service, 123 F.2d 787, 790 (10th Cir. 1941); Bryan County, Oklahoma v. United States, 123 F.2d 782, 784 (10th Cir. 1941); Glacier County, Montana v. United States, 99 F.2d 733, 734 (9th Cir. 1938) (does not cite Choate, but states the general proposition as to tax exemptions and vested rights, and cites a previous Ninth Circuit case, United States v. Nez Perce County, 95 F.2d 232 (9th Cir. 1938) in which Choate is cited); United States v. Nez Perce County, 95 F.2d 232 (9th Cir. 1938); Board of Commissioners of Tulsa County, Oklahoma v. United States, 94 F.2d 450, 451 (10th Cir. 1938) - District Court, Court of Claims - Agua Caliente Band of Mission Indians v. County of Riverside, 306 F.Supp., 279, 284 (C.D. Calif. 1969); Choctaw Nation v. United States, 100 F.Supp. 318, 320 (Ct. Cl. 1951); Taunah v. Jones, 90 F.Supp. 459, 463 (W.D. Okla. 1950); United States v. Ferry County, Washington, 39 F.Supp. 1007, 1010, 1011, 1012 (E.D. Wash. 1941); United States v. Spaeth, 24 F.Supp. 465, 467 (D. Minn. 1938); United States v. Ferry County, Washington, 24 F.Supp. 399, 400 (E.D. Wash. 1938); McIntire v. United States, 22 F.Supp. 316, 320 (D. Mont. 1936); United States v. Powers, 16 F.Supp. 155, 162 (D. Mont. 1936).

[9] Approximately 62% of the Northern Cheyenne Indian Reservation is already owned by the Tribal Council and may be leased and mined regardless of the outcome of this case. Only the remaining 37% is here at issue.

Indian owners of the coal will receive the royalties generated from such development. Thus, the energy policy issues presented by Petitioner cannot be resolved in the instant case. Hence, no new question of profound general public importance is presented by this case.

I. The Background Of The Allotment System Clarifies The Nature Of The Rights Involved.

This brief explanation of the Indian land allotment system and the type estates it produced is particularly important to a proper understanding of the rights here at issue. This is because the estates produced by an allotment system peculiar to Indian reservations are far removed from the "mainstream" of non-Indian law practice. Also Petitioner's claims asserting Congress' broad powers to re-allocate Indian property[10] rests upon a failure to properly distinguish between the individual Indians' property and communally held tribal property. This distinction is the key to resolving this case.

Prior to their settlement on reservations, the Indians of the North Plains knew no exclusive property rights to real property. Rather, they viewed land as being for the communal, non-exclusive use and occupancy of its inhabitants. When these people were settled on reservations, they continued to recognize the non-exclusive use and occupancy of land as a proper mode of tenure.

During the late 1800's, it became apparent that most Indian reservations were being surrounded by the non-Indian culture. Faced with the problems attending such inter-cultural clash, Congress deemed it advisable to homogenize these cultural differences by converting the Indian to the ways of the white man.[11] Noting individual land ownership was essential to this cultural transition, Congress implemented a system dividing tribal lands into parcels for ownership by individual Indians.[12] This was the allotment system.[13]

[10] Petition for Writ of Certiorari, at 18-23.

[11] F.Cohen Handbook of Federal Indian Law, 206-210 (1940).

The allotment system set forth a scheme for the transition of Indian lands from tribal ownership to ownership by individual Indians.[14] This transition had several phases. In each successive phase, the allottee acquired more complete title until finally he could take a fee patent.

So long as the land was tribal land, the individual Indian had no vested right in such land.[15] However, once the individual Indian chose and filed his application for the allotment, the land

[12] Act of Feb. 8, 1887, 24 Stat. 388 and various implementing acts. Commenting on Congress' Legislative motives, Mr. Cohen wrote: "The supreme aim of the friends of Indian was to substitute white civilization for his tribal culture, and they shrewdly sensed that the difference in concepts of property was fundamental in the contrast between the two ways of life....So on the one hand, allotment was counted on to break up tribal life." Cohen, Handbook of Federal Indian Law, 208 (1940).

The U.S. Supreme Court described the transition of title under the allotment system as follows: "For a long period Congress pursued the policy of imposing as rapidly as possible, our system of individual land tenure on the Indian. To this end tribal or communal land holdings of the Indians were superceded by allotment to individuals, who were protected against improvidence by restrictions on alienation." Arenas v. United States, 322 U.S. 419, 420-21 (1944). (emphasis added).

[13] For further accounts on the development of the allotment system see: J. Kinney, A Continent Lost - A Civilization Won (1937); D.S. Otis, History of the Allotment Policy (1934) found at the Hearings, Committee on Ind. Aff. 73rd Cong., 2d Session on H.R. 7902 (1934).

[14] These allotment acts typically provided for the reservation to be surveyed into tracts, enrolled members of the tribe could select a parcel as their allotment, upon approval of such allotment by the Secretary of the Interior a trust patent issued on said allotment, and that upon the expiration of the 25 year restraint on alienation, the Indian could receive a fee patent on the land.

[15] United States v. Jim, 409 U.S. 80 reh.den. 409 U.S. 1118 (1972); Gritts v. Fisher, 224 U.S. 640 (1912);
Also see F. Cohen Handbook on Federal Indian Law, 183-85 (1940).

was removed from tribal ownership.[16] The allottee's rights in the land vested either when his completed application was filed or when the Secretary of the Interior approved the application.[17] Once the application was approved, the trust patent issued. Under the trust patent the United States held legal title as guardian of the allottee while the allottee held equitable title to the land.[18] The allottee's equitable title is regarded as fee title[19] subject to a restraint on alienation[20] enforced by the government.[21] The allottee's title was also predominate over any interest the tribe may claim in such land,[22**] and if the minerals pass with the allotment they are the allottee's property protected by the Constitution.[23]

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[16] Raymond Bear Hill, 52 I.D. 688 (1929).

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[17] The applicable date depends on whether the allotment act specific to that reservation gives the Secretary of the Interior descretion in issuing the allotment. See Arenas v. United States, 322 U.S. 419 (1944) particularly United States v. Arenas, 138 F.2d 730 (9th Cir. 1946) cert. denied, 331 U.S. 842 (1947); Raymond Bear Hill, 52 I.D. 688 (1929); Rights of Indians to Allotments In San Juan County, Utah, 57 I.D. 547 (1947). The case acknowledging the Secretary's descretion was St. Marie v. United States, 108 F.2d 876 (9th Cir. 1940), cert. denied, 311 U.S. 652 (1940) however this case is rather weak due to the later Arenas, cases.

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[18] Act of Feb. 8, 1887, 24 Stat. 388(5); Payne v. New Mexico, 255 U.S. 367 (1921); Rights of Indians to Allotments in San Juan County, Utah, 57 I.D. 547 (1942).

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[19] Arenas v. United States, 322 U.S. 419, 421 (1944). Mott v. United States, 283 U.S. 747, 749 (1931). Fish v. Wise, 52 F.2d 544 (10th Cir. 1931) cert. denied 282 U.S. 903 (1931).

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[20] Act of Feb. 8, 1887, 24 Stat. 388.

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[21] Heckman v. United States, 224 U.S. 413 (1912).

[22**] In Fish v. Wise, 52 F.2d 544 (10th Cir. 1931) cert. denied, 282 U.S. 903 (1931) the Tenth Circuit specifically rejected a tribe's attempt to reallocate the mineral estate of Indian allottees.

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[23] Mott v. United States, 283 U.S. 747 (1931).

However, the allottee could not alienate the land so long as the federal government held the land in trust. Once the period for holding the land in trust had expired, a patent in fee, free of all encumbrance, could be issued to the allottee or his heirs.[24]

Not all reservation land was allotted. Some was sold to non-Indian homesteaders and some remainded under tribal ownership. In 1934 the allotment of land ceased.[25]

There are presently several types of ownership of reservation land: land which had been allotted and is in individual Indian ownership; land owned by non-Indian individuals and; land which is not allotted and remains in tribal ownership.

Thus, commonly held tribal land is a very different estate than the individually owned Indian allotments (here at issue).

As a result, Congress may not indiscriminately exercise control over reservation lands. Rather, the extent to which Congress may exercise control over such land depends on the type ownership of the land. Congress may re-allocate benefits of tribal land as it pleases[26] but may only manage individual property (here at issue) subject to the constitutionally protected property rights of the individual owners.[27]

II. Choate v. Trapp Properly Controls The Result of The Instant Case.

The Ninth Circuit relied on Choate v. Trapp, 224 U.S. 665 (1912)

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[24] Act of Feb. 8, 1887, 24 Stat. 388(5); 25 C.F.R. 121.

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[25] Act of June 18, 1934, 48 Stat. 984.

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[26] The reason for this being that no individual's rights have vested to interfere with such reallocation. See United States v. Jim, 409 U.S. 80, reh. den. 409 U.S. 1118 (1972); Gritts v. Fisher, 224 U.S. 640 (1912).

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[27] Choate v. Trapp, 244 U.S. 665 (1912).
English v. Richardson, 224 U.S. 680 (1912).
Also see cases cited in footnote 8**.

in recognizing the Indian allottees' constitutionally protected property rights. However, the Petitioner tries to cast doubt on this reliance by confusing rights incident to tribally owned property (communally owned) with rights incident to individually owned property. The distinction between tribal and individually owned property was set forth in two landmark cases, Choate v. Trapp, 224 U.S. 665 (1912) and Gritts v. Fisher, 224 U.S. 640 (1912).[28**] Analysis of these two cases proves the Ninth Circuit's decision below correct.

II.A. Individual Indians Have Constitutional Rights In Individually Owned Trust Allotments According To Choate v. Trapp.

Choate, controls the result of the instant case because both Choate and the instant case involve the individual Indians' rights in their individually owned property.

In Choate the Choctaw and Chickasaw Indians took allotments under authority of a statute which provided such land was tax exempt. A later federal statute repealed this tax exemption. However, this Court held the later statute, allowing taxation, divested rights of the allottees in their individual property, violated the Fifth Amendment due process clause.[29]

The Choate decision is important for several reasons.

First, Choate recognized Indians' rights in their individually owned property.[30] Such property rights are constitutionally pro-

[28**] It is particularly useful to read these two cases together. While they were not companion cases as such, they were both presented to this Court during the same term and both opinions were delivered on the same day. Thus, both cases, were on the Justices' minds when they were formulating both decisions and both the Gritts case and the Choate case appear to be drafted to acknowledge and compliment the other.

[29] U.S. Const. Amend. V.

[30] Choate v. Trapp, 224 U.S. at 677 stated: "There have been comparatively few cases which discuss the legislative power over private property held by Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His private rights are secured and enforced to the same extent in the same way as other residents or citizens of the United States." (emphasis added)

tected from divestment or diminishment (including "reallocation") by the due process clause. It is most important to note that the rights in Choate were the rights of individual Indian allottees in their land held under TRUST ALLOTMENTS.[32] This is the same interest and the SAME TYPE ESTATE presented by the Respondent/Allottees in the case at bar. Consequently, Choate compells a recognition of the Northern Cheyenne allottees' vested rights in their allotment land. Recognition of the allottees' property rights, in turn, compells affirmance of the Ninth Circuit's decision below.

The second important point in Choate v. Trapp is that due process protects against action by the federal government. This is important because only the federal government has the board plenary powers resulting from its guardianship relation to the Indians.[33]

Consequently, striking down a federal Indian statute brings Choate further in point,[34] and specifically limits Congress' other-

[31] Again, Choate v. Trapp, 224 U.S. at 674 emphasized: "Under the provisions of the Fifth Amendment there was no more power to deprive him of the exemption than other right in the property. No statute would have been valid which reduced his fee to a life estate or attempted to take from him ten acres, or fifty acres, or the timber growing on the land....It is conceded that no right which was actually confered upon the Indian can be arbitrarily abrogated by statute." (emphasis added)

The fact that diminishment, hence "reallocation" of individual property is prohibited is particularly important in light of the trial court's attaching considerable importance to this just being a "reallocation" somehow removing the divestment problem. See Northern Cheyenne Tribe v. Hollowbreast, 349 F.Supp. 1302, 1311 (D. Mont. 1972).

[32] Only under trust allotments are restraints on alienation imposed (See n. 18, 19, 20, & 24.) The later statute allowing taxation also attempted to remove this restraint. Since the rights must have vested prior to passage of this later statute, (See Reply Brief of Appellants Williamson and Bowen to the Ninth Circuit pages 17-19) such rights must have bested in trust allotments.

[33] Worcester v. Georgia, 6 Pet. 515 (1832) held the federal government is guardian of the Indians, such guardianship being immune from interference by the states. See also Williams v. Lee, 358 U.S. 217 (1959), and McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973).

[34] Since the case at bar also involves a federal statute, Act of July 29, 1968, 82 Stat. 424, the holding in Choate is, in principle, directly in point so as to be controlling in this case.

wise broad guardianship powers. Petitioner emphasizes Congress' guardianship powers.[35] However, Congress' guardianship powers were also before this Court in Choate and this Court specifically rejected this argument when weighed against the constitutional rights of Indian individuals.

> ".... it was said that incompetent persons, though citizens, may not have the full right to control their property and there was nothing in citizenship incompatible with guardianship,....But there was no indication that the power of wardship conferred authority on Congress to lessen any of the rights of property which have been vested in the individual Indian by prior laws or contracts. Such rights are protected from repeal by the provisions of the Fifth Amendment." Choate v. Trapp, 224 U.S. at 578 (emphasis added).

Thus, the Choate decision and the Ninth Circuit's decision below parallel each other in many respects: both involve individual Indians' property rights; both involve property rights in trust allotments; both affirm the existence and protection of such rights; both reject attempts to divest such rights by a later federal statute; and both limit the federal government's powers as guardian of the Indians' private property. In the face of these parallels Choate clearly controls the disposition of the instant case. Consequently, the Ninth Circuit's decision below is correct.

II.B. Individual Indians Have No Right Or Enforceable Title In TRIBAL Property According To Gritts v. Fisher.

Gritts v. Fisher,[36] compliments Choate in defining the extent of individual Indians' property rights in estates peculiar to Indian reservations.[37]

In Gritts enrollment on the tribal rolls closed on a given date.

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[35] Petition for Writ of Certiorari, at 18-23.

[36] 224 U.S. 640 (1912).

[37] See n. 28.

Only those enrolled prior to that date were legally members of the tribe. The tribal land was to be allotted among the enrolled members. The left over tribal land was to be sold to homesteaders with the proceeds to be distributed among the enrolled members. A later statute re-opened the tribal rolls to permit additional enrollment. The original enrollees sued to prevent diminishment of their share of funds from liquidation of the TRIBAL PROPERTY. Hence, the issue in Gritts was: Did the original enrollees have a vested right in the proceeds from TRIBAL property? This Court answered, "NO". While an individual Indian holds no vested right in tribal property, the Gritts decision carefully pointed out it deals ONLY WITH TRIBAL PROPERTY, not with individual allotments.[38] In fact the Gritts decision expressly disclaimed any right to reallocate individual property,[39] in recognition of the Choate decision. Similarly, the Choate decision expressly recognized the Gritts holding[40] denying individual rights in tribal property.

In conclusion, Choate recognized vested rights in individually owned allotments while Gritts denied such rights in tribal property. Since Choate and Gritts dealt with different types of estates, they do not contradict each other. Accordingly, Petitioner's claim that Gritts and its re-affirmations[41] undermine Choate is in error.

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[38] "It is not proposed to disturb the individual allotments...." Gritts v. Fisher, 224 U.S. at 647. And again: "As has been indicated their individual allotments are not affected." Id. at 648.

[39] "....It is conceded, and properly so, that the latter legislation is valid and controlling unless it impairs or destroys rights which the act of 1902 vested in members living September 1, 1902, and enrolled under that act. As has been indicated, their individual allotments are not affected." Gritts v. Fisher, 244 U.S. 640, 648 (1912) (emphasis added). Thus, the court was careful to point out that no vested rights were involved because it only affected the sale of tribal property and the proceeds from that sale which was also tribal property.

[40] Choate v. Trapp, states: "The individual Indian has no title or enforceable right in tribal property." 224 U.S. at 671.

[41] See n. 66, 67, 68 69, 70 & 71.

II.C. The Decision In Choate v. Trapp Is Based On Statutory, Not Contractual, Rights.

Petitioner claims Choate v. Trapp, deals only with contract rights.[42] While the dicta of a few decisions appear to misread Choate in this respect, this "contract right" interpretation of Choate is rejected by:

The legal basis of Choate;

The specific language of the Choate decision;

Substantial case law following the Choate decision;

and, Interpretation by the leading scholar in the field.

Additionally, according to substantial authority, any contract or treaty rights at stake in Choate could have been altered by subsequent federal statute (a result opposite that of Choate). Hence, contract rights could not supply the basis of the Choate decision.

If the Indians' rights in Choate rested upon contract rights, the Choate decision would have rested on the "impairment of contract" clause.[43] However, the Choate decision contains no mention of the "impairment of contract" clause. Rather, the Choate decision hinges on Fifth Amendment due process rights. Thus, the legal basis of the Choate decision requires the rights there involved be statutory property rights, not contract rights.

The language of the Choate decision specifically disclaims any reliance on any contract or treaty rights. The Court stated:

> "The question in this case, therefore, is not whether the plaintiffs were parties to the Atoka agreement, but whether they had not acquired rights under the Curtis Act which are now protected by the Constitution of the United States." 224 U.S. at 671.

This quote spells out that contract rights (the Atoka agreement being the supposed contract) were not at issue. Rather, statutory

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[42] Petition for Writ of Certiorari, at 15-18.

[43] U.S. Const. Art. 1, Sec. 10.

based property rights (the Curtis Act being the allotment act) were at issue. Also other language in the Choate decision re-affirms the allotment act as the source of the allottee's rights.[44]

On several occasions in his noted treatise, The Handbook of Federal Indian Law, Felix Cohen specifically interprets Choate as protecting private property rights[45] stemming from a statute.[46] Mr. Cohen is undoubtedly the foremost expert in this field to date. Accordingly, his interpretation should be most persuasive, and is indeed correct.

Futhermore, English v. Richardson,[47] Ward v. Love County[48] and

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[44] For instance: "Those who signed the patent could not convey more rights than they were granted by that part of the Curtis Act.. ..." 224 U.S. at 673 (emphasis added). And; "The patent issued in pursuance of those statutes gave the Indian as good a title to the exemption as it did to the land itself." 224 U.S. at 673-74. (emphasis added).

[45] Mr. Cohen states; "As in the case of private property generally, Congress cannot deprive an Indian of his land or any interest therein without due process of law or take such property for public purposes without just compensation. An outstanding decision on the subject is Choate v. Trapp...." F. Cohen, Handbook of Federal Indian Law, 97-98 (1940). (emphasis added)

Also, "Under the United States Constitution, the rights of the Indian in his private property, whatever they may be, are secured and enforced to the same extent and in the same way as other residents or citizens of the United States." Id. at 195 (emphasis added) citing Choate v. Trapp.

[46] "The principle of construction in favor of Indians is also applied to Congressional statutes", F. Cohen, Handbook of Federal Indian Law, 172 (1940), citing Choate v. Trapp, as authority for this proposition.

Also, "The leading case of Choate v. Trapp, held that under this statute allottees acquired a vested property right to exemption from state taxation....and could not be impaired by subsequent Congressional action without violation of the Fifth Amendment of the Federal Constitution." Id. at 437. (emphasis added)

[47] 224 U.S. 680 (1912).

[48] 253 U.S. 17 (1919).

Carpenter v. Shaw,[49] were all decided by this Court, all involved the very same statutory tax exemption as Choate and all expressly interpreted Choate as recognizing statutory based property rights.[50] Petitioner's reliance on the dicta of Brader v. James,[51] and its re-affirmations,[52] does not undermine Choate, because these decisions dealt with the Indians' personal status as a ward, not with property rights.[53] This distinction was expressly noted in Choate, and was

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[49] 280 U.S. 363 (1929).

[50] In English v. Richardson, this Court stated: "The right to the plaintiff to the exemption granted by Congress is protected by the Constitution on principles stated and applied in Choate v. Trapp." 224 U.S. at 681. (emphasis added)

The fact that the U.S. Supreme Court acknowledged these rights as "granted by Congress" indicates these rights were statutory rights.

Again in Ward v. Love County, this Court stated: "This was settled in Choate v. Trapp.....and was also settled in those cases that the exemption was a vested property right arising out of a law of Congress and protected by the Constitution of the United States.. ...through the pending suits and otherwise they were objecting and protesting taxation of their lands which had been forbidden by a law of Congress." 253 U.S. at 20, 23. (emphasis added).

And still again in Carpenter v. Shaw, this Court referred to Choate stating: "It was there held that the provision for the exemption conferred upon the allottees' property rights which were within the protection of the Fifth Amendment and hence it was not subject to repeal by later Congressional legislation;...." 280 U.S. at 365-66 (1929). (emphasis added)

[51] 245 U.S. 88 (1918).

[52] Actually Brader basically reaffirmed Tiger v. Western Investment Co., 221 U.S. 286 (1911) and United States v. Jackson, 280 U.S. 183 (1930) reaffirmed Brader and Tiger. Understandably Petitioner is reluctant to cite the lead case, Tiger, since Choate expressly reconciled Tiger's holding (and in turn Brader and Jackson's).

See the next footnote for the text of this "reconciliation".

[53] The Choate decision stated: "Nothing that was said in Tiger v. Western Investment Co.,....is opposed to the same conclusion here. For that case did not involve property rights, but related solely to the power of Congress to extend the period of the Indians' disability. The statute did not attempt to take his land or any right, member, or appurtenance thereto belonging. It left that as it was." 224 U.S. at 678 (1912). (emphasis added) This decision was also quick to note that wardship provided no basis for impairing vested property rights. (See this brief at 11 and n. 77.)

dealt with at length in the briefs below.[54]

In short, on numerous occasions, this Court has adopted a broad interpretation of Choate specifically contradicting Petitioner's "contract rights" misinterpretation.

In addition, numerous cases have held that tribal contracts or treaty rights may be changed by subsequent federal statute.[55] In fact, the Choate decision expressly agrees with this proposition.[56] Therefore, if the allottees in Choate premised their case on contract rights under the Atoka agreement, they would have lost. By using Petitioner's "contract" theory of Choate, it would have been decided directly contrary to its actual results. Clearly, Petitioner's MISunderstanding of Choate could not be more complete.

III. The Allottees' Remainder Interest In The Mineral Estate Was Conveyed By The Original Trust Patents.

The Northern Cheyenne allotment act of 1926[57] fully conveyed the mineral estate with the allottees' remainder interest vesting upon

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[54] See Defendants Williamson and Bowen's Brief in Opposition to the Petition for Rehearing submitted to the Ninth Circuit below. pp. 11-13.

[55] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Thomas v. Gay, 169 U.S. 214 (1898); United States v. White, 508 F.2d 453 (8th Cir. 1974); Nicodemus v. Washington Water and Power Co., 264 F.2d 614, 617 (9th Cir. 1959); National Indian Youth Council v. Bruce, 366 F.Supp. 313, 316 (N.D. Utah 1973); United States v. 2,005.32 Acres of Land etc., 160 F.Supp. 193, 196 (N.D. So.Dak. 1958).

[56] "There are many cases....recognizing the plenary powers of Congress over Indian Tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by later 'statute'. The tribes have been regarded as dependent nations, and treaties with them have been looked upon not as contracts but as public laws which could be abrogated at the will of the United States. For although the Atoka agreement is in the form of a contract, it is still an integral part of the Curtis act, and, if not a treaty, is a public law relating to tribal property, and as such is amendable and repealable at the will of Congress." 224 U.S. at 671. (emphasis added).

[57] Act of June 3, 1926, 44 Stat. 690.

completion of their allotment applications. This is indicated by the mandatory language of the statute, its legislative history and the omission of language delaying the conveyance common to other allotment acts.

The allotment act states unequivocally, the minerals "shall become the property of the respective allottees". While "shall become" delays the possession of the minerals, "shall" is mandatory language requiring a present vesting when the allottees' rights attach. The allottees' rights to equitable title vest upon completion of their allotment applications[58] and the minerals pass with the equitable title.[59] The allottees' applications must have been completed and filed prior to June 18, 1934.[60] Consequently, the allottee's remainder interest in the minerals were perfected by 1934.[61]

The legislative history of the Northern Cheyenne allotment act confirms a deliberate Congressional intent to convey the minerals to the allottees. An amendment to this act which would have allotted

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58 See n. 16, 17, 18; also Arenas v. United States, 322 U.S. 419 (1944); Wyoming v. United States, 255 U.S. 489 (1921); Payne v. New Mexico, 255 U.S. 367 (1921); Right of Indians to Allotments in San Juan County Utah, 57 I.D. 547 (1942); Allotment Selections on the Fort Belknap Indian Reservation, 55 I.D. 295 (1935); Raymond Bear Hill, 52 I.D. 688 (1929); Benson Min. & Smelting Co. v. Alta Min. & Smelting Co., 145 U.S. 428 (1892).

59 Mott v. United States, 283 U.S. 747 (1931); Wyoming v. United States, 255 U.S. 489 (1921); Particularly see Raymond Bear Hill, 52 I.D. 688 (1929) which held an amendment to an allotment act reserving the minerals to the tribe did not affect allotments applied for prior to passage of the amendment.

60 The Wheeler-Howard Act, Act of June 18, 1934, 48 Stat. 984 terminated allotment of tribal land. Only allotment applications perfected as of that date were issued. See Allotment Selections On The Fort Belknap Indian Reservation, 55 I.D. 295 (1935).

61 Hence Petitioner's attempt to distinguish Choate v. Trapp, on the basis that it only protects completed allotments (Petition for Writ of Certiorari p. 17) must fail because all the allotments were completed by 1934!

only the "surface rights" was proposed, considered and rejected.[62] In response to this amendment Congress gave the remainder mineral interest to the allottees.[63] This indicates a deliberate, calculated Congressional desire to give the minerals to the allottees.

By contrast, on other reservations Congress either gave the minerals to the tribe in perpetuity[64] or reserved its option to extend tribal ownership by including an "unless otherwise provided by Congress"[65] proviso in the grant of minerals. This "unless otherwise provided by Congress" language became a commonly used method of keeping Congress' options open, and was used in numerous allotment acts drafted prior to the Northern Cheyenne's allotment act. The conspicuous absence of this commonly used statutory language indicates Congress recognized allottees' immediately vesting interest in the minerals.

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62 See Petition for Rehearing, pp. 13-15. H.Rep.No. 383, 69th Cong. 1st Sess. S.Rep.No. 638, 69th Cong., 1st Sess.

63 Petition for Rehearing, p. 14. S.Rep.No. 638, 69th Cong., 1st Sess.

64 Act of March 3, 1927, 44 Stat. 1401, 41 Stat. 408 dealing with the Fort Peck Indian Reservation (this is actually an amendment to the allotment act but it did not affect allotments perfected prior to the amendments' passage. See Raymond Bear Hill, 52 I.D. 688 (1929).)

65 Among the allotment acts using the "unless otherwise provided by Congress" language are the Act of June 28, 1906, 34 Stat. 539 dealing with the Osage Indian Reservation (see Adams v. Osage Tribe, 59 F.2d 653, (10th Cir. 1932) for an interpretation of this proviso); the Act of May 29, 1908, 35 Stat. 460 concerning the Standing Rock and Cheyenne River Reservations; the Act of June 30, 1919, 41 Stat. 17 concerning the Blackfeet Indian Reservation; the Act of June 4, 1920, 41 Stat. 751 concerning the Crow Indian Reservation; and the Act of March 3, 1921, 41 Stat. 1355 concerning the Fort Belknap Indian Reservation. Note, all these statutes were drafted prior to the Northern Cheyennes' allotment act here at issue.

IV. Congress' Authority In Conducting Indians Affairs Does Not Otherwise Permit Divesting Vested Allotment Rights.

This section is a reply to the Petition for Writ of Certiorari, pages 18-22. On this point, Petitioner claims Congress retains power to reallocate tribal property, even though such power is not expressly reserved. Here Petitioner paints the issues involved with a very broad brush so as to misconstrue the authorities cited, and blur the distinction between individual and tribal property.

All the authorities Petitioner cites fall into several categories which clearly do not apply to the rights at stake in the instant case. Petitioner's authorities on this point may be catagorized as follows:

1. The following cases deal only with tribal land, not individually owned property:

United States v. Jim, 409 U.S. 80 (1972) [66]
Chase Jr., v. United States, 256 U.S. 1 (1921) [67]
United States v. Rowell, 243 U.S. 464 (1917) [68]
Sizemore v. Brady, 235 U.S. 441 (1914) [69]
Nadeau v. Union Pacific Railroad, 253 U.S. 442 (1920) [70]

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66 The Jim case involved distribution of royalties from tribal lands, thus it correctly applied the Gritts rule for the reallocation of tribal property.

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67 In Chase, Jr., a statute terminated allotment before Mr. Chase had selected his allotment. This court held that no individual rights had vested (since an application for an allotment was not timely filed) so the land remained tribal and could be re-allocated.

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68 In the Rowell case an allotment application of a non-Indian was revoked prior to issuance of the patent. This court held that prior to issuing the patent, the land remained tribal and the individual's rights had not vested yet.

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69 The Sizemore case involved inheritance rights in an allotment when the allottee died prior to actually receiving the allotment. This court held that the land was still tribal so Congress could amend the inheritance distribution after the allottees' death.

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70 The Nadeau case involved only UNallotted land given to the railroad.

United States v. Chase, 245 U.S. 89 (1917) [71]

Since these cases deal only with tribal land, they fall under the Gritts rule, [72] rather than the Choate rule. Consequently, they are not applicable to the instant case.

2. Most other cases cited deal with the personal status of the parties, not their property rights per se. (i.e., personal rights and privileges such as citizenship and treaty rights peculiar to Indian persons, or limitations on personal rights such as wardship).

This category may be divided as follows:

(A) Personal characteristics (or status) which serves as a condition prior to allotment eligibility. The following cases fit this category:

Lowe v. Fisher, 223 U.S. 95 (1912) [73]
Wallace v. Adams, 204 U.S. 415 (1907) [74]
Stephens v. Cherokee Nation, 174 U.S. 445 (1899) [75]

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71 The Chase case involved a dispute over a tract of land between one who claimed under a right of occupancy through a treaty, and one who claimed the land through a later allotment statute. The rights under the allotment act prevailed. Prior to the allotment, the land retained its tribal character and no rights could vest therein.

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72 See section IIB of this Brief.

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73 In Lowe this Court held the Secretary of the Interior could check the tribal enrollment list and exclude persons erroneously enrolled. Tribal enrollment was a pre-requisite to allotment eligibility. Consequently, the allotment could also be revoked, because the allotment's pre-requisites had not been met so the rights never actually vested.

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74 Both Wallace v. Adams and Stephens v. Cherokee Nation involve the same basic issue as Lowe but the tribal enrollment is cast in terms of citizenship. All these cases reach the same result. (See n. 73.)

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75 See n. 73 and 74.

Since the issues in these cases involve pre-requisites for allotment eligibility, they address the allotment process prior to any vesting of individual rights. Consequently, any principles set forth in these cases have no bearing on the instant case.

(B) Other conditions dealing with the Indian's personal status[76] as a ward of the government:[77]

United States v. Jackson, 280 U.S. 183 (1930)
Brader v. James, 246 U.S. 88 (1918) 78

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[76] See n.52, 53 and 77 and Defendants Williamson and Bowen's Brief in Opposition to the Petition for Rehearing, pp. 11-13.

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[77] Most of the cases in this category involve the question of whether Congress can extend the period of the restraint on alienation of trust allotments. These cases are Tiger v. Western Investment Co., Goat v. United States, Heckman v. United States, Brader v. James, and United States v. Jackson. Tiger is the lead case. This Court held that the restraint on alienation was an attribute of the Indian's wardship. Thus, it related to his personal status, not a property right. Moreover this Court in Choate v. Trapp, expressly noted this distinction and reconciled the results of Choate and Tiger.

The Choate decision stated: "Nothing that was said in Tiger v. Western Investment Co.,....is opposed to the same conclusion here. For that case did not involve property rights, but related solely to the power of Congress to extend the period of the Indian's disability. The statute did not attempt to take his land or any right, member, or appurtenance thereto belonging. It left that as it was." Choate v. Trapp, 224 U.S. 665, 678 (1912) (emphasis added).

The Court was quick to add that wardship provided no basis for abrogating property rights.

"But there was no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property which had been vested in the individual Indian by prior laws or contracts. Such rights are protected from repeal by the Fifth Amendment." Id. at 678.

Choate also distinguished the restraint on alienation due to wardship included in Tiger from the tax exemption property right as follows: "But the exemption and non-alienability were two separate and distinct subjects. One conferred a right and the other imposed a limitation.....The right to remove the restriction was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma. Id. at 673. (emphasis added).

Goat, Heckman, Brader and Jackson just re-affirmed Tiger.

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[78] See n. 77.

Williams v. Johnson, 239 U.S. 414 (1915) 80
United States v. Bartlett, 235 U.S. 72 (1914)
Heckman v. United States, 224 U.S. 413 (1912) 81
Goat v. United States, 224 U.S. 458 (1912) 82
Tiger v. Western Investment Co., 221 U.S. 286 (1911) 83

Since these cases deal with the Indian's personal status as a ward, NOT with property rights, they are not applicable to the instant case.

3. Petitioner's only remaining authority is Sweet v. Schock, 245 U.S. 192 (1917). The issue in this case was whether an allotment's tax exemption runs with the land or requires continuing Indian ownership. This case held that when an allotment is sold to a non-Indian[84], the tax exemption ceases. This case did not divest any Indian's rights to a tax exemption as Petitioner would have us believe.

Indeed this Court has held directly contrary to Petitioner's claim that guardianship serves as no justification to confiscate

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[79] In Williams v. Johnson the question was the converse of the Tiger case. The issue was whether Congress could end the restraint on alienation prior to the original statutory period. This Court held such early termination was legal, again using the Tiger rationale that the restraint on alienation was a personal attribute of wardship, not a property right.

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[80] The Bartlett case simply held the extending restraints on alienation did not apply to land existing under a fee patent (freed from the restraint on alienation) prior to the passage of the act.

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[81] See n. 77.

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[82] See n. 77.

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[83] See n. 77.

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[84] The statute dissolving the tax exemption upon alienation of the land was passed prior to the land sale at issue. Consequently, the purchaser took subject the statute's terms.

Indians' property.

The above listed cases distinguish EVERY case cited by Petitioner in the Petition for Writ of Certiorari, at 18-23.

In conclusion, Petitioner's authority is, at best, out of point. As such it supports neither the issues as stated by Petitioner nor the issues of this case. As such Petitioner's claim should be rejected.

CONCLUSION

In Conclusion, the Ninth Circuit correctly interpreted Choate v. Trapp in the decision below. Accordingly, the recognition and enforcement of the allottees' vested remainder in the minerals was proper. Also, upon examination, Petitioner's authority does not actually undermine Choate or its application to the instant case.

As a result, this Court should deny jurisdiction and allow the Ninth Circuit's opinion below to stand.

Respectfully submitted,

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85 Lane v. Santa Rósa, 249 U.S. 110 (1919) at 113 stated "That would not be an exercise of guardianship but an act of confiscation" and prohibited the federal goverment's abrogating Indian property rights. Also see Choate v. Trapp, and n. 8.

CERTIFICATE OF MAILING

This will certify that a true and correct copy of the aforegoing Brief In Opposition To The Petition For Writ Of Certiorari was mailed on the 20th day of August, 1975, to:

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Supreme Court, U. S.
FILED
OCT 7 1975
MICHAEL RODAK, JR., CLERK

No. 75-145

In the Supreme Court of the United States

OCTOBER TERM, 1975

THE NORTHERN CHEYENNE TRIBE, PETITIONER

v.

WILLIAM HOLLOWBREAST, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
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MEMORANDUM FOR THE UNITED STATES

The Act of June 3, 1926, 44 Stat. 690, provided for the allotment of land on the Northern Cheyenne Indian Reservation in Montana to individual Indians. It reserved mineral rights for the Tribe, with the following proviso (44 Stat. 691, Section 3):

> That at the expiration of fifty years from the date of the approval of this Act the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall become the property of the respective allottees or their heirs * * *.

In 1968, however, Congress amended the 1926 Act by deleting the above proviso and adding language reserving the mineral rights for the benefit of the Tribe "in perpetuity." Act of July 24, 1968, 82 Stat. 424. The 1968 Act also provided, however, that this provision would be ineffective unless the Tribe secured a judicial decision that the mineral rights were not vested in the allottees by the 1926 Act (82 Stat. 425, Section 2). The question presented in this case, filed by the Tribe pursuant to the latter provision, is whether the 1926 Act created a vested property right in the allottees. If so, the 1968 statute would by its terms be null and void and the mineral interests would pass in 1976 to the allottees and their successors in interest.[1]

[1] The Act of July 24, 1968, 82 Stat. 424, states:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 3 of the Act of June 3, 1926 (44 Stat. 690), as amended by the Act of July 24, 1947 (61 Stat. 418), and the Act of September 22, 1961 (75 Stat. 586), is hereby amended to read as follows:

"'SEC. 3. (a) The coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved in perpetuity for the benefit of the tribe and may be leased with the consent of the Indian council for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a-f), under such rules, regulations, and conditions as the Secretary of the Interior may prescribe.

"'(b) The unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians.'

"SEC. 2. The Northern Cheyenne Tribe is authorized to commence in the United States District Court for the District of Montana an action against the allottees who received allotments pursuant to the Act of June 3, 1926, as amended, their heirs or devisees, either individually or as a class, to determine whether under the provisions of the Act of June 3, 1926, as amended, the allottees, their heirs or devisees, have received a vested property right in the minerals which is protected by the fifth amendment. The United States District Court for the District of Montana shall have jurisdiction to hear and determine the action and an appeal from its judgment may be taken as provided by law. If the court determines that the allottees, their heirs or devisees, have a vested interest in the minerals which is protected by the fifth amendment, or if the tribe does not commence an action as here authorized within two years from the date of this Act, the first section of this Act shall cease to have any force or effect, and the provisions of section 3 of the Act of June 3, 1926, as amended by the Acts of July 24, 1947, and September 21, 1961, shall thereupon be carried out as fully as if section 3 had not been amended by this Act."

For the reasons set out below, the United States takes no position in this case and does not intend to file further papers herein. At the request of the Department of the Interior, however, we are including in this memorandum a statement of the views of that Department.

In the District Court and before the Court of Appeals the Department of Justice represented Myron L. Littlebird, an Indian with an inherited interest in an allotment on the Northern Cheyenne Reservation. This representation was undertaken at Mr. Littlebird's request pursuant to 25 U.S.C. 175, which authorizes such representation.[2] In the lower courts, the Department of Justice argued on Mr. Littlebird's behalf that the 1926 Act created a vested property right in the allottees, principally on the basis of a comparison of the 1926 Act with similar Acts dealing with other res-

[2] 25 U.S.C. 175 provides as follows: "In all States and Territories where there are reservations or allotted Indians the United States Attorney shall represent them in all suits at law and in equity." This provision has been held to establish a discretionary authority to provide representation rather than a mandatory duty. See *Siniscal* v. *United States*, 208 F.2d 406 (C.A. 9), certiorari denied, 348 U.S. 818.

ervations, which specifically gave Congress the power to alter a scheduled passing of mineral rights to allottees.[3] Accordingly, the Department contended that the transfer of mineral rights to the Tribe provided by the 1968 Act is, under Section 2 of that Act, null and void and that the mineral interests at issue will become the property of Mr. Littlebird and other allottees and successors to allottees at the expiration of the time set in the 1926 Act.

On September 29, 1975, however, Mr. Littlebird executed a document entitled "Request to Discontinue Representation" (reproduced as Appendix A, *infra*), in which he stated that he had changed his position and that he now believed it would be preferable for the Tribe to retain the mineral interests in perpetuity rather than for those interests to pass to the allottees and their successors. In that document he stated that he no longer wanted the Department of Justice to represent him in the case.

In these circumstances we believe that it would be inappropriate for the United States to express any position with respect to this case. However, the Department of the Interior has requested that we bring its views to the attention of the Court. Those views are set out in Appendix B, *infra*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

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[3] *E.g.*, Act of March 3, 1921, 41 Stat. 1355; Act of June 4, 1920, 41 Stat. 751.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 73–1545

THE NORTHERN CHEYENNE TRIBE, PLAINTIFF-APPELLEE
v.
NORTHERN CHEYENNE DEFENDANT CLASS OF ALLOTTEES, HEIRS AND DEVISEES, DEFENDANT-APPELLANT

No. 73–1546

THE NORTHERN CHEYENNE TRIBE, PLAINTIFF-APPELLEE
v.
ELVA L. LITTLECHIEF WILLIAMSON AND JAMES BOWEN, DEFENDANTS-APPELLANTS

No. 73–1547

THE NORTHERN CHEYENNE TRIBE, PLAINTIFF-APPELLEE
v.
MYRON L. LITTLEBIRD, DEFENDANT-APPELLANT

REQUEST TO DISCONTINUE REPRESENTATION

I, Myron L. Littlebird, being one of the individual allottee defendants in this action, hereby state as follows:

That in 1971 I requested the then United States Attorney, Otis L. Packwood, to represent me in this action brought by the Northern Cheyenne Tribe against many individual allottees of the Northern Cheyenne Reservation. It was my understanding that the action was brought for the purpose of determining

an Act of Congress which would reserve in perpetuity the minerals underlying the Northern Cheyenne Reservation for the benefit of the Northern Cheyenne Tribe. The prior Acts of Congress would have made the minerals underlying the land the property of the individual allottees.

At the time I requested the United States Attorney to represent me I felt that it would be best for individual owners, as myself, to retain the ownership of the minerals under our allotments. Since moving to the reservation about two years ago, I have observed the actions of the Northern Cheyenne Business Council and now believe that it would be best for all enrolled members of the Tribe to have all of the minerals underlying our reservation, owned by the Tribe for the benefit of all enrolled members.

I have not been pressured into this change of position by the Business Council or any member of the Tribe. Because of this change in my thinking I no longer desire or want the United States Attorney for the District of Montana to represent me in this case, which is now before the Supreme Court of the United States.

It is my understanding that the Northern Cheyenne Tribe's position was upheld by the District Court in Montana and this decision was reversed by the Court of Appeals of the Ninth Circuit, and it was that reversal that is presently before the Supreme Court. If the Supreme Court affirms the Circuit Court's holding it is my understanding that the minerals would be owned by the individuals. If the Supreme Court reverses the Court of Appeal's decision, then it is my

understanding that the Tribe would hold in perpetuity the minerals underlying my reservation, for the benefit of all members.

DATED this 29th day of September, 1975.

/S/MYRON L. LITTLEBIRD.

APPENDIX B

MEMORANDUM SETTING FORTH THE VIEWS OF THE DEPARTMENT OF THE INTERIOR

The Department of the Interior's position is that the Court should grant certiorari in the present case. First, the Department believes that the decision of the Court of Appeals is wrong on the law and inconsistent with past decisions of this Court. Moreover, the Department believes that the consequences of the decision would be destructive of congressional policy toward Indian tribes and of the Department's policies and programs to an extent which is potentially disastrous for the Northern Cheyenne Tribe and the preservation of the Tribe's land and culture.

On the merits, the Department believes the Court of Appeals erred in its construction of the 1926 statute. Initially, the language of that statute clearly indicates that the allottees' mineral rights would vest only in the future: such rights, the statute said, "*shall become* the property of the respective allottees or their heirs" in 1976. (Emphasis added.) This unequivocal use of the future tense is in marked contrast to several other grants of rights *in praesenti* established by the statute. Section 1 of the statute, for example, noted that the Northern Cheyenne Reservation had been established by executive order only, and it confirmed tribal ownership by stating that the Reservation "be, and the same

is hereby, declared to be the property of said Indians * * *." (Emphasis added.) Similarly, section 2 stated that "[t]he right *is hereby* reserved to any Indian to select as his allotment a tract occupied by him at the time of the approval of this Act * * *." (Emphasis added.) And with specific respect to mineral rights, the Act stated that such rights *"are hereby reserved* for the benefit of the tribe * * *." (Emphasis added.) The Court of Appeals' holding thus is at odds with a clear distinction on the face of the statute between terms reflecting the vesting of various present rights and the use of language indicating a future vesting of mineral rights in the allottees. The fact that other statutes dealing with other reservations[1] in some instances employ language even more specifically "future" or conditional is not determinative, since it is the language of the 1926 Act itself which should control its interpretation.[2]

Even if the approach of the Court of Appeals is accepted as appropriate, however, the Department

[1] *E.g.*, Act of March 3, 1921, 41 Stat. 1355 (Fort Belknap Reservation: mineral deposits in allotted lands reserved for tribe for fifty years, thereafter to become property of allottees, "but the right is reserved to Congress to extend the period within which such reserved tribal rights shall expire"); Act of June 4, 1920, 41 Stat. 751 (Crow Reservation: mineral deposits to become property of allottees after fifty years "unless otherwise ordered by Congress").

[2] Congress has plenary power over Indian affairs and property. *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832); *Perrin* v. *United States*, 232 U.S. 478, 486 (1914). While this power of course does not give Congress authority to take vested property rights without compensation, it does serve as a backdrop against which to assess the question of whether Congress should be presumed to have limited its inherent power simply because it fails to repeat particular terminology used in other statutes.

believes that the court's conclusion is nonetheless invalid, for the 1926 Act in any event contains language similar to the terminology in the other statutes referred to above. Section 3 of the Act separated from the allotted surface ownership rights the appurtenant mineral rights, which were "reserved for the benefit of the tribe" for fifty years. Hence the mineral rights clearly were not allotted. And section 3 went on to state explicitly that "the unallotted lands of said tribe of Indians shall be held in common, *subject to the control and management thereof as Congress may deem expedient* for the benefit of said Indians." 44 Stat. at 691 (emphasis added). Moreover, section 1 of the Act, which declared the Northern Cheyenne Reservation to be the property of the Northern Cheyennes, specifically stated that such property was "subject to such control and management * * * as the Congress of the United States may direct." The "pro-Indian" canons of construction used by the court to avoid the effect of these provisions, while generally sound, are inappropriate here since Indian interests are represented on both sides of the case and since a tribal resolution immediately preceeding the 1926 Act appeared to understand and favor a splitting of the mineral and surface estates, with the Tribe to receive the mineral estate in perpetuity (Pet. p. 30).

At the heart of the approach taken by the Court of Appeals is a misapplication of past decisions of this Court dealing with Congress' power to alter statutory schemes affecting Indian property. In this respect the court's reliance on *Choate* v. *Trapp,* 224 U.S. 665 (1912), is misplaced. The law governing the validity of

congressional action in distributing or redistributing tribal property is not entirely clear. Compare *Choate* v. *Trapp, supra,* with *United States* v. *Jim,* 409 U.S. 80 (1972) (*per curiam*); *United States* v. *Rowell,* 243 U.S. 464 (1917); and *Gritts* v. *Fisher,* 224 U.S. 640 (1912). That fact itself tends to justify a grant of certiorari here, which would enable this Court to clarify the controlling legal principles. But there is no doubt that the present case is considerably closer to cases such as *Rowell, supra,* than to *Choate.*

In *Rowell,* Congress initially enacted a statute whereby the Secretary of the Interior was "authorized and directed to issue a patent in fee" to Rowell, an adopted member of the Kiowa Tribe who had received no allotment. Before the patent issued, however, Congress, having been informed that the tract in question was much more valuable than had been thought, repealed the statute. Rowell claimed that a vested property right had been taken by the repealer, but this Court disagreed. The opinion stated:

> "[I]f, before that direction [to issue a patent] was complied with, it was discovered that the land designated was lawfully devoted to a special use from which it could not be withdrawn with due regard for the tribe in general, or that its situation and value were such that to allot or convey it to [Rowell] would invest him with much more than a fair distributive share of the common property of the tribe, we think it was * * * admissible for Congress to recall that direction in the interest of the tribe as a whole." 243 U.S. at 468–69.

The Court concluded that there was no grant *in praesenti,* since the statute spoke merely of a patent

to be issued in the future. And here, of course, the situation is essentially the same: in 1926 Congress envisioned a transfer of mineral rights in the future, but later acted to cancel the expected transfer before it occurred. Especially where (as in *Rowell*) Congress is dealing essentially with an allocation of tribal property between a tribe and its members, its plenary power over Indian affairs justifies such action. See *United States* v. *Jim, supra. Choate* v. *Trapp,* by contrast, involved (1) the grant by Congress of a tax immunity that had already gone into effect by the time of the purported cancellation, and (2) a controversy between Indians on the one hand and the State of Oklahoma on the other, not merely a question concerning the allocation of tribal property between a tribe and its members.

The Department further believes certiorari is appropriate in this case in light of a serious inconsistency between the decision below and federal policy toward American Indians and toward the Northern Cheyenne Tribe in particular, as embodied in the Indian Reorganization Act of 1934, 48 Stat. 984, and in recent actions by the Secretary of the Interior. Indeed, the decision of the Court of Appeals threatens to have disastrous consequences for those policies and for the Northern Cheyenne Tribe.

The Indian Reorganization Act ("IRA") explicitly ended the "allotment" policy of earlier congressional enactments (such as the 1926 Act) and encouraged the consolidation of tribal landholdings on reservations and tribal reacquisition of land previously fraction-

ated by that allotment policy.[3] The purpose of the IRA in this respect was basically to promote the governmental authority of tribes and to end the divisive individualism and losses of Indian land that characterized the allotment era. See, *e.g.*, Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess. 15–18 (1934). The wisdom of the IRA's approach in this regard is, moreover, manifest in the present situation. The Northern Cheyenne Reservation contains massive deposits of valuable coal inviting commercial strip-mining. Tribal control of those deposits is required if the Tribe is to be able to ensure that such mining is conducted according to standards and pursuant to a plan which will not allow the Tribe's homeland to be despoiled or its heritage to be diluted by chaotic or excessive mining or an uncontrolled influx of outsiders.

During the past two years this problem has been under active consideration by this Department in several respects. Most significantly, in January 1974 the Tribe submitted to the Secretary of the Interior a formal petition asking that various coal leases and prospecting permits previously issued to energy companies be canceled for alleged legal defects. On June 4, 1974, after lengthy review of the problem at the highest levels of this Department, the Secretary responded to the petition with a written decision, a central purpose of which was basically to ensure that the Tribe would have control over development of the Reservation and that no further development would take place with-

[3] See, *e.g.*, 25 U.S.C. §§ 461, 463, 465.

out the Tribe's approval. The decision, however, was premised on the assumption that the Tribe owned the coal deposits on the Reservation. If that premise is rendered unsupportable by the Court of Appeals' decision, there is a good chance that the policy of the Secretary, as embodied in his decision of June 4, 1974—to aid the Northern Cheyenne Tribe in guarding against uncontrolled or destructive strip-mining of the Reservation—will be frustrated by the actions of individual owners of mineral rights.[4] As trustee for all Northern Cheyenne Indians, therefore, the Department of the Interior believes that it is essential for this Court to grant certiorari and reverse the Ninth Circuit's decision.

[4] To be sure, the Secretary has statutory power to approve or disapprove proposed leases of allotted lands still held in trust. But, in accordance with the Secretary's fiduciary duty to Indian allottees, this power is exercised principally to ensure a fair rental to the lessor, not—as in the case of tribal leases—on the basis of additional concerns such as protecting tribal culture and society. Moreover, some of the lands originally allotted under the 1926 Act have passed into non-Indian ownership and no longer are held in trust; as to such tracts the Secretary has no approval authority.

U.S. GOVERNMENT PRINTING OFFICE: 1978

Supreme Court, U. S.
FILED
FEB 5 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975
No. 75-145

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Petitioner,

v.

WILLIAM HOLLOWBREAST, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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SUBJECT INDEX

Page

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Constitutional And Statutory Provisions And Executive Orders Involved 3

Statement 3

a. The Northern Cheyenne Allotment Act of 1926..... 5

b. The 1968 Amendment to the Northern Cheyenne Allotment Act 9

c. Decisions Below 12

Summary Of Argument..... 13

Argument 15

1. The Plain Language Of The 1926 Act Clearly Indicates That All Reservation Minerals Be Withheld From Allotment, Retained In Tribal Ownership, And Made Subject To Continuing Congressional Control. This Is Confirmed By The Language Of The Allotment Patents..... 15

a. The Language of the 1926 Act..... 15

b. The Language of the Allotment Patents..... 18

2. Congress Retains Continuing Power To Alter Its Statutory Plans For The Distribution Of Tribal Property To Tribal Members. It Was Under This Power That Congress Enacted The 1968 Amendment 22

a. While the 1926 Act (§§1&3) Contains Express Reservations of Congress' Power to Amend That Statutory Allotment Plan, Such Reservations Were Not Legally Required..... 37

Page

3. The 1968 Amendment Does Not Violate the Rule of *Choate v. Trapp*—That Congress May Not, Consistent With The Fifth Amendment, Deprive Tribal Members of Property Rights Which They Have Acquired Through the Consummation of Statutory Allotment Plans Founded on Contract.... 39
   a. The Factual Background of *Choate v. Trapp*.... 39
   b. Particular Facts Giving Rise to *Choate v. Trapp* 42
   c. The Decision of This Court in *Choate v. Trapp* 43
   d. Decision of This Court Subsequent to *Choate v. Trapp* 48
   e. Decisions of Lower Federal Courts Subsequent to *Choate v. Trapp* 53
4. The Circumstances Surrounding The 1926 Act And The Legislative History Of The Act Clearly Support The Act's Plain Meaning—Namely, That All Reservation Minerals Be Withheld From Allotment, Retained In Tribal Ownership, And Made Subject To Continuing Congressional Control..... 57
   a. History and Condition of the Northern Cheyennes 58
   b. The 1925 Northern Cheyenne Petition to Congress 63
   c. Formulation and Passage of the 1926 Northern Cheyenne Allotment Act 66
   d. Federal Policy Contemporaneous With the Passage of the 1926 Act..... 73
5. The 1968 Amendment Was An Exemplary Exercise Of Congress' Plenary Power Over Indian Affairs And Comported With Current Public Policy 78

Conclusion 83

Page

Appendix A-1
Northern Cheyenne Allotment Act of 1926 ..... A-1
1947 Amendment to Northern Cheyenne Allotment Act A-4
1961 Amendment of Northern Cheyenne Allotment Act A-5
1968 Amendment of Northern Cheyenne Allotment Act A-6
Executive Order of November 26, 1884 ..... A-7
Executive Order of March 19, 1900 ..... A-8
The Original Bill A-10
House Committee on Indian Affairs Report A-12
Senate Committee on Indian Affairs Report A-14

TABLES OF AUTHORITIES

Table of Cases

Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) 58
Arenas v. United States, 322 U.S. 419 (1944) 53
Assiniboine & Sioux Tribes v. Nordwick, 378 F.2d 426 (9th Cir. 1967), *cert. denied*, 389 U.S. 1046 (1968) 20, 37
Board of Comm'rs of Tulsa County, Okla. v. United States, 94 F.2d 450 (10th Cir. 1938) 57
Brader v. James, 246 U.S. 88 (1918) 35, 38, 50
British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159 (1936), *rehearing denied*, 299 U.S. 624 (1937) 13, 20
Bryan County, Okla. v. United States, 123 F.2d 782 (10th Cir. 1941) 57
Burke v. Southern Pacific R.R., 234 U.S. 669 (1914) 51
Carpenter v. Shaw, 280 U.S. 363 (1930) 18, 50

Page

Chase, Jr. v. United States, 256 U.S. 1 (1921) 16, 28, 36, 38

Cherokee Intermarriage Cases, 203 U.S. 76 (1906) 18

Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902) 22

Chippewa Indians v. United States, 307 U.S. 1 (1939) 29, 30

Chippewa Indians v. United States, 88 Ct. Cl. 1 (1938) 29

Choate v. Trapp, 224 U.S. 665 (1912) .....12, 14, 18, 39, 42 *et seq.*

Choate v. Trapp, 28 Okla. 517, 114 P. 709 (1911) 43

Clark, Jr. v. Benally, 51 I.D. 91 (1925), *aff'd on rehearing*, 51 I.D. 98 (1925) 37, 53

Confederated Bands of Ute Indians v. United States, 330 U.S. 169 (1947) 6

English v. Richardson, 224 U.S. 680 (1912) 43, 49

English v. Richardson, 28 Okla. 408, 114 P. 710 (1911) 43

Finch v. United States, 387 F.2d 13 (10th Cir. 1967).... 37

Fink v. County Commissioners, 248 U.S. 399 (1919) 49

Fort Peck Indians v. United States, 132 F. Supp. 222, 132 Ct. Cl. 373 (1955) 33, 34

Franklin v. Lynch, 233 U.S. 269 (1914) 53

Glacier County, Mont. v. United States, 99 F.2d 733 (9th Cir. 1938) 55, 56

Gleason v. Wood, 224 U.S. 679, (1912) 43

Gleason v. Wood, 28 Okla. 402, 114 P. 703 (1911)..... 43

Goat v. United States, 224 U.S. 458 (1912) 35, 38

Gritts v. Fisher, 224 U.S. 640 (1912) 14, 23-24, 25, 32, 36, 38, 49

Hallowell v. United States, 221 U.S. 317 (1911) 21

Page

Heckman v. United States, 224 U.S. 413 (1912) 35, 38

Hendrick v. Lindsay, 93 U.S. 143 (1876) 46

Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430 (1869) 46

Hopkins v. United States, 414 F.2d 464 (9th Cir. 1969) 37

Hynes v. Grimes Packing Co., 337 U.S. 86 (1949) 6

Jones v. Meehan, 175 U.S. 1 (1889) 47

Keller v. Ashford, 133 U.S. 610 (1890) 46

Klamath and Modoc Tribes v. United States, 436 F.2d 1008 (Ct. Cl. 1971), *cert. denied sub nom.*, 404 U.S. 950 (1971) 33

Landman v. Commissioner, 123 F.2d 787 (10th Cir. 1941) 57

LaRoque v. United States, 239 U.S. 62 (1915) 19

Levey v. Stockslager, 129 U.S. 470 (1889) 52

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 22

Lowe v. Fisher, 223 U.S. 95 (1912) 35, 38

Mahnomen County v. United States, 319 U.S. 474 (1943) 50

Morrow v. United States, 243 F. 854 (8th Cir. 1917) 49, 53

Mullen v. Pickens, 250 U.S. 590 (1919) 52

Nadeau v. Union Pacific R.R., 253 U.S. 442 (1920) 26, 27, 52

New Jersey v. Wilson, 11 U.S. (7 Cranch) 164 (1812) 45, 46

Payne v. Central Pac. Ry., 255 U.S. 228 (1921) 51

Payne v. New Mexico, 255 U.S. 367 (1921) 51

Platt v. Union Pacific R.R., 99 U.S. 48 (1878) 57

Reichart v. Felps, 73 U.S. (6 Wall.) 160 (1867) 47

Page

St. Marie v. United States, 108 F.2d 876 (9th Cir. 1940), *cert. denied*, 311 U.S. 652 (1940) 53

Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942) 6

Sizemore v. Brady, 235 U.S. 441 (1914) 24, 25, 36, 38, 50,51

Squire v. Capoeman, 351 U.S. 1 (1956) 18

Stephens v. Cherokee Nation, 174 U.S. 445 (1889) 22, 34-35

Sweet v. Schock, 245 U.S. 192 (1917) 16, 35, 38, 49, 50

Territory of Alaska v. American Can Co., 358 U.S. 224 (1959) 57

The Delaware, 161 U.S. 459 (1896) 57

Tiger v. Western Investment Co., 221 U.S. 286 (1911) 35, 38

Tomlinson v. Jessup, 82 U.S. (15 Wall.) 454 (1872) 46

Udall v. Tallman, 380 U.S. 1 (1965) 19

United States v. Arenas, 158 F.2d 730 (9th Cir. 1946) 53

United States v. Bartlett, 235 U.S. 72 (1914) 35, 38

United States v. Benewah County, Idaho, 290 F. 628 (9th Cir. 1923) 55, 56

United States v. Board of Comm'rs of Comanche County, Okla., 6 F. Supp. 401 (W.D. Okla. 1934) 57

United States v. Chase, 245 U.S. 89 (1917) 14, 16, 26-27, 38

United States v. Ferry County, 39 F. Supp. 1007 (E.D. Wash. 1941) 56

United States v. Ferry County, Wash., 24 F. Supp. 399 (E.D. Wash. 1938) 55, 56

United States v. Holliday, 70 U.S. (3 Wall.) 407 (1866) 21

United States v. Jackson, 280 U.S. 183 (1930) 19, 21, 35, 38, 52

Page

United States v. Jim, 409 U.S. 80 (1972) 14, 23, 30, 31, 32-33, 38, 50

United States v. Kagama, 118 U.S. 375 (1886) 21

United States v. Nez Perce County, Idaho, 95 F.2d 232 (9th Cir. 1938) 55, 56

United States v. Pierce, 235 F.2d 885 (9th Cir. 1956) 53

United States v. Rowell, 243 U.S. 464 (1917) 16, 25-26, 38, 52

United States v. Southern Pacific R.R., 223 U.S. 565 (1912) 51

United States v. Spaeth, 24 F.Supp. 465 (D. Minn. 1938) 55

Wallace v. Adams, 204 U.S. 415 (1907) 35, 38

Williams v. Johnson, 239 U.S. 414 (1915) 35

Winton v. Amos, 255 U.S. 373 (1921) 22

Wisconsin & Michigan Ry. v. Powers, 191 U.S. 379 (1903) 46

Woodward v. DeGraffenried, 238 U.S. 284 (1915) 50

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 21

Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke, 300 U.S. 440 (1937) 57

Wyoming v. United States, 255 U.S. 489 (1921) 51

Table of Constitutional Provisions

U.S. CONST. art. I, §8, cl. 3 21

U.S. CONST. art. III, §2 11

U.S. CONST. amend. V 3, 11, 12, 34, 35, 36, 39

Table of Statutes & Treaties

Act of July 24, 1968, 82 Stat. 424 .....2, 3, 9, 10, 11, 12, 14 *et seq.*, A-6-7

	Page
Act of May 17, 1968, 82 Stat. 121	32
Act of September 22, 1961, 75 Stat. 586	2, 3, 8, 11, A-5-6
Act of August 13, 1954, 68 Stat. 718	33
Act of July 24, 1947, 61 Stat. 418	3, 7-8, 11, A-4
Act of June 15, 1935, 49 Stat. 378	4
Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §461 *et seq.* (1970)	29, 58, 82
Act of June 18, 1934, 48 Stat. 979	5, 29
Act of March 1, 1933, 47 Stat. 1418	31, 32
Act of April 11, 1928, 45 Stat. 423	29
Act of June 3, 1926, 44 Stat. 690	2, 3, 5, 6-8, 9, 10 *et seq.*, A-1-4
Act of May 14, 1926, 44 Stat. 555	29
Act of May 10, 1926, 44 Stat. 453	60
Act of March 3, 1925, 43 Stat. 1141	60
Act of June 5, 1924, 43 Stat. 390	60
Act of January 24, 1923, 42 Stat. 1174	60
Act of May 24, 1922, 42 Stat. 552	60
Act of March 3, 1921, 41 Stat. 1355	77
Act of March 3, 1921, 41 Stat. 1249	77
Act of March 3, 1921, 41 Stat. 1225	60
Act of June 4, 1920, 41 Stat. 751	76, 80
Act of February 14, 1920, 41 Stat. 408	60
Act of June 30, 1919, 41 Stat. 3	20, 60, 76
Act of August 1, 1914, 38 Stat. 582	60
Act of June 30, 1913, 38 Stat. 77	60
Act of June 6, 1912, 37 Stat. 125, 43 U.S.C. §1196 (1970)	34
Act of May 11, 1912, 37 Stat. 111	28

	Page
Act of April 4, 1910, 36 Stat. 269	60
Act of March 3, 1909, 35 Stat. 778	77
Act of May 30, 1908, 35 Stat. 558	33, 73, 76, 80
Act of May 27, 1908, 35 Stat. 312	36, 42, 49
Act of March 1, 1907, 34 Stat. 1015	20, 60, 73, 76, 80
Act of June 28, 1906, 34 Stat. 539	77
Act of June 21, 1906, 34 Stat. 325	54, 60
Act of April 26, 1906, 34 Stat. 137	36, 49
Act of April 27, 1904, 33 Stat. 352	73
Act of April 23, 1904, 33 Stat. 302	73, 80
Act of March 3, 1903, 32 Stat. 982	36, 60
Act of July 1, 1902, 32 Stat. 716	23
Act of July 1, 1902, 32 Stat. 641	35, 43
Act of June 30, 1902, 32 Stat. 500	36
Act of March 1, 1901, 31 Stat. 861	24, 36
Act of July 1, 1898, 30 Stat. 571	34, 59
Act of June 28, 1898, 30 Stat. 495	41-42, 43
Act of June 10, 1896, 29 Stat. 321	34
Act of March 3, 1893, 27 Stat. 612	28, 41
Act of January 14, 1889, 25 Stat. 642	29, 54
Act of May 1, 1888, 25 Stat. 113	73
Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. §331 *et seq.* (1970)	5, 74
Act of August 7, 1882, 22 Stat. 341	26, 28
Act of July 1, 1862, 12 Stat. 489	27
28 U.S.C. §1254(1) (1970)	2

Page

Treaty With the Pottawatomies of Nov. 15, 1861, 12 Stat. 1191 27

Treaty With the Omaha Indians of Mar. 6, 1865, 14 Stat. 667 26

Table of Other Authorities

Administrative Decisions & Reports

BUREAU OF THE CENSUS, EXTRA CENSUS BULLETIN, THE FIVE CIVILIZED TRIBES OF THE INDIAN TERRITORY (1894) 40

Constitutional Power of Congress to Enact Legislation Concerning the Allotment of Lands to the Mission Indians of California, 56 I.D. 102 (1937) 36-37, 53

DEP'T OF THE INTERIOR, ANNUAL REPORT FOR 1920, vol. II, REPORT OF THE BOARD OF INDIAN COMMISSIONERS (1920) 59, 62, 64, 78

DEP'T OF THE INTERIOR, ANNUAL REPORT FOR 1919, vol. II, REPORT OF THE BOARD OF INDIAN COMMISSIONERS (1920) 64

DEP'T OF THE INTERIOR, ANNUAL REPORT FOR 1906 (1907) 65

DEP'T OF THE INTERIOR, THE PROBLEM OF INDIAN ADMINISTRATION (1928) 75

DEP'T OF THE INTERIOR, *Written Decision of Secretary of the Interior Rogers C. B. Morton Regarding Northern Cheyenne Coal Development* (June 4, 1974) (unpublished) 81

MONTANA DEP'T OF INTERGOVERNMENTAL RELATIONS—DIVISION OF PLANNING AND ECONOMIC DEVELOPMENT, NORTHERN CHEYENNE PLANNING STUDY (1973) 79, 80

NAT'L ARCHIVES, INSPECTION REPORT—NORTHERN CHEYENNE INDIAN RESERVATION, Record Group No. 75, Box 148, Folder 150 .....5, 65

U.S. BUREAU OF MINES, MINERAL RESOURCES AND THEIR POTENTIAL ON INDIAN LANDS—NORTHERN CHEYENNE RESERVATION, BIG HORN AND ROSEBUD COUNTIES (unpublished) 79

Page

Books

R. ANDRIST, THE LONG DEATH—THE LAST DAYS OF THE PLAINS INDIANS (1964) 59

F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1941).. 82

A. DEBO, AND STILL THE WATERS RUN—THE BETRAYAL OF THE FIVE CIVILIZED TRIBES (1972 ed.)....40, 41, 42, 81

G. FOREMAN, INDIAN REMOVAL—THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS (1932)..... 40

W. HAGAN, AMERICAN INDIANS (1961).....61, 74, 76

M. LIBERTY & J. STANDS IN TIMBER, CHEYENNE MEMORIES (1967) 67

J. MCLAUGHLIN, MY FRIEND THE INDIAN (1963 ed.)..59, 60

D. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (1973 ed.) 5

THE INDIAN, AMERICA'S UNFINISHED BUSINESS (S. Aberle & W. Brophy eds. 1966)..... 82

THE INDIAN IN AMERICA'S PAST (J. Forbes ed. 1964)..... 76

S. TYLER, A HISTORY OF INDIAN POLICY (1973)....74, 75, 76

W. WASHBURN, THE ASSAULT ON INDIAN TRIBALISM: THE GENERAL ALLOTMENT LAW (DAWES ACT) OF 1887 (1975).....5, 58

Congressional Bills & Resolutions

H.R. 9558, 69th Cong., 1st Sess. (1926).....68, 69, A-12-13

S. 3261, 69th Cong., 1st Sess. (1926)..... 69

S. Res. 79, 70th Cong., 2d Sess. (1928)..... 61

Congressional Documents & Reports

H.R. REP. No. 1292, 90th Cong., 2d Sess. (1968)..10, 11, 81

H.R. REP. No. 383, 69th Cong., 1st Sess. (1926) 65, 68, 69, A-12-13

Page

H.R. REP. No. 153, 55th Cong., 3d Sess. (1899) 59

S. REP. No. 1145, 90th Cong., 2d Sess. (1968).....10, 11, 81

S. REP. No. 1123, 90th Cong., 2d Sess. (1968)..... 78

S. DOC. No. 64, 72d Cong., 1st Sess. (1933)..... 31

S. REP. No. 638, 69th Cong., 1st Sess. (1926)....70, A-14-17

Congressional Hearings

Hearings on Indian Affairs Before a Subcomm. of the Senate Comm. on Indian Affairs, 72d Cong., 1st Sess., pt. 23, "MONTANA" (1929).....61, 62, 66, 78

Hearings on H.R. 7902 Before the House Comm. on Indian Affairs, 73d Cong., 2d Sess. (1934)..... 82

Hearings on Survey of Conditions of the Indians in the United States Before the Senate Comm. on Indian Affairs, 70th Cong.-78th Cong. (1928-43).....61, 76

Congressional Record

67 CONG. REC. 9901 (1926) 67, 71

67 CONG. REC. 9886 (1926) 9, 67, 71, 72

67 CONG. REC. 9885 (1926) 67, 71

67 CONG. REC. 9848 (1926) 67

67 CONG. REC. 9735 (1926) 67, 71

67 CONG. REC. 6312 (1926) 67, 70

67 CONG. REC. 5449 (1926) 67

Executive Orders

Executive Order of March 19, 1900, I C. KAPPLER, INDIAN AFFAIRS— LAWS AND TREATIES 860 (1904) 3, 5, 60, A-8-9

Page

Executive Order of November 26, 1884, I C. KAPPLER, INDIAN AFFAIRS— LAWS AND TREATIES 860 (1904) 3, 4-5, A-7-8

Newspapers & Periodicals

Billings [Montana] Gazette, Nov. 12, 1975 82

Billings [Montana] Gazette, July 9, 1975 79

COAL AGE, Mid April 1973, vol. 78, no. 5 79

Hardin [Montana] Herald, Nov. 27, 1975 82

N.Y. Times, Feb. 5, 1973 80

N.Y. Times, Aug. 22, 1971 79

Washington Post, June 11, 1973 80

Scholarly Articles

Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975) 21

Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955 (1972) 74

Young, *Indian Removal and Land Allotment: The Civilized Tribes and Jacksonian Justice*, LXIV AM. HISTORICAL REV. (1958) 40

Tribal Provisions

DEP'T OF THE INTERIOR, CONSTITUTION AND BY-LAWS OF THE NORTHERN CHEYENNE TRIBE OF THE TONGUE RIVER RESERVATION (1957) 4

DEP'T OF THE INTERIOR, CORPORATE CHARTER OF THE NORTHERN CHEYENNE TRIBE OF THE TONGUE RIVER RESERVATION (1937) 4

IN THE

Supreme Court of the United States

October Term, 1975
No. 75-145

THE NORTHERN CHEYENNE TRIBE,
Petitioner,

v.

WILLIAM HOLLOWBREAST, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 505 F.2d 268 (1974). The opinion of the District Court for the District of Montana is reported at 349 F.Supp. 1502 (1972).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 17, 1974. On December 28, 1974, Associate Justice William O. Douglas of the United States Supreme Court entered an order extending

the time to file a petition for writ of certiorari to March 1, 1975. On February 19, 1975, Associate Justice William J. Brennan, Jr. of the United States Supreme Court entered an order further extending that time to March 16, 1975. On February 20, 1975, Petitioner filed with the Ninth Circuit Court of Appeals a motion for leave to file an untimely petition for rehearing. On February 28, 1975, the Ninth Circuit Court of Appeals entered an order granting Petitioner leave to file a petition for rehearing and recalling the original mandate. On March 14, 1975, Petitioner filed a petition for rehearing with the Ninth Circuit Court of Appeals. The Court of Appeals invited Respondents to submit briefs, considered the petition for rehearing on the merits, and on April 28, 1975, entered an order denying the petition for rehearing. The petition for certiorari was filed within 90 days of that date, and was granted on October 14, 1975. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1970).

QUESTIONS PRESENTED

In 1926, Congress enacted the Northern Cheyenne Allotment Act, 44 Stat. 690, which withheld all reservation minerals from allotment—but provided that these minerals would become the property of the allottees or their heirs after 50 years. However, in a 1968 amendment to the Act, 82 Stat. 424, Congress provided that the minerals would remain in tribal ownership in perpetuity.

1. Did the 1926 Act, as amended, endow the allottees, their heirs or devisees[1] with a vested property right in the

1. The 1926 Act specified "the allottees, or their heirs" as recipients of that future allotment. In 1961, Congress amended the Act to add devisees to that group of prospective allottees. Act of September 22, 1961, 75 Stat. 586 (page A-5, *infra*).

minerals which is protected by the Fifth Amendment?

2. Did Congress, in enacting the 1926 Act, as amended, relinquish the power to alter the statutory plan contained therein for allotment of the minerals after 50 years?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND EXECUTIVE ORDERS INVOLVED

United States Constitution, Amendment V:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Northern Cheyenne Allotment Act, Act of June 3, 1926, 44 Stat. 690, as amended by: Act of July 24, 1947, 61 Stat. 418; Act of September 22, 1961, 75 Stat. 586; Act of July 24, 1968, 82 Stat. 424. These statutory provisions are set out at A-1-7, *infra*.

Executive Order of November 26, 1884, I C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 860 (1904), which created the Northern Cheyenne Reservation; Executive Order of March 19, 1900, I C. KAPPLER, INDIAN AFFAIRS —LAWS AND TREATIES 860 (1904), which enlarged the Northern Cheyenne Reservation; these executive orders are set out at A-7-9, *infra*.

STATEMENT

The petitioner The Northern Cheyenne Tribe is an Indian tribe situated in southeastern Montana upon the 444,000-acre Northern Cheyenne Reservation. Out of a total tribal population of approximately 3,600 enrolled members, roughly 3,000 tribal members live on the Reservation. Organized under a tribally-ratified and federally-

approved constitution and by-laws,[2] the Northern Cheyenne Tribe is governed by a tribal council whose members are duly elected on a district basis by the Northern Cheyenne people.[3]

The respondents William Hollowbreast *et al.* are a class of 1,481 allottees, their heirs, or devisees,[4] owning allotments of surface land upon the Northern Cheyenne Reservation. While the class consists mainly of Northern Cheyenne tribal members, approximately 250 persons in the class are not Northern Cheyenne tribal members[5] and 539 persons in the class—more than one-third of the class—live off the Reservation[6] in various and sundry locations.[7]

The history of the Northern Cheyenne Reservation dates to 1884, when the Reservation was created by Executive

2. "[T]he Northern Cheyenne Tribe of the Tongue River Reservation in Montana is a recognized Indian Tribe organized under a constitution and by-laws ratified by the Tribe on November 2, 1935 and approved by the Secretary of the Interior on November 23, 1935, pursuant to section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378). . . ." DEP'T OF THE INTERIOR, CORPORATE CHARTER OF THE NORTHERN CHEYENNE TRIBE OF THE TONGUE RIVER RESERVATION (1937).

3. DEP'T OF THE INTERIOR, CONSTITUTION AND BY-LAWS OF THE NORTHERN CHEYENNE TRIBE OF THE TONGUE RIVER RESERVATION art. III, §§1-2 (1957).

4. R. 10, 174.

5. R. 407.

6. R. 20-80, 174.

7. The allottees, heirs and devisees reside throughout the United States in such locations as Seattle (R. 21, 23, 27, 28, 32, 38, 64), Portland (R. 21, 23, 47), San Francisco (R. 32, 70), Los Angeles (R. 21, 28, 31, 49, 61, 62, 78, 174), Pasadena (R. 47, 54), Phoenix (R. 56, 77, 80), Salt Lake City (R. 28), Albuquerque (R. 37, 77), Dallas (R. 57), Oklahoma City (R. 40), Denver (R. 25, 35, 46, 49, 64, 68, 73), Minneapolis (R. 32, 71, 72), Chicago (R. 32, 54), Cleveland (R. 61), New York City (R. 35, 65), Groton, Connecticut (R. 56), Bayonne, New Jersey (R. 44), Baldwin, Florida (R. 71), Fort Walton Beach, Florida (R. 72), and Honolulu, Hawaii (R. 80).

Order of November 26, 1884.[8] Three years later the fate of America's Indian reservations was significantly affected by Congress' enactment of the General Allotment Act of 1887.[9] While many reservations were allotted shortly thereafter, thirty-nine years transpired before Congress adopted an allotment plan for the Northern Cheyenne Reservation in 1926;[10] six years later—in 1932—actual allotment commenced, while less than two years thereafter—in 1934—Congress chose to terminate the practice of allotment by its enactment of the Indian Reorganization Act.[11]

a. The Northern Cheyenne Allotment Act of 1926

The 1926 Act is a straightforward piece of legislation; its formulation is clear and logical. Section 1 declares the entire Reservation to be the property of the Tribe. This was the first explicit congressional confirmation of the Tribe's title to the Reservation. It endowed the Tribe with "recog-

8. I C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 860 (1904) (pages A-7-8, *infra*). A further Executive Order in 1900 enlarged the Northern Cheyenne Reservation by expanding its eastern boundary to the Tongue River. Executive Order of March 19, 1900, I C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 860 (1904) (pages A-8-9, *infra*).

9. Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. §331 *et seq.* (1970). *See generally* D. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (1973 ed.); W. WASHBURN, THE ASSAULT ON INDIAN TRIBALISM: THE GENERAL ALLOTMENT LAW (DAWES ACT) OF 1887 (1975).

10. Act of June 3, 1926, 44 Stat. 690 (pages A-1-4, *infra*).

11. Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§461-79 (1970). Actually, the termination-of-allotment provision (§461) and all other provisions of the Indian Reorganization Act are only binding if tribally approved (§478). However, in accordance with §478 of the Act, on October 27, 1934, the Northern Cheyenne people affirmatively voted to become subject to the Indian Reorganization Act. NAT'L ARCHIVES, INSPECTION REPORT—NORTHERN CHEYENNE INDIAN RESERVATION, Record Group No. 75, Box 148, Folder 150 at 1.

nized" title to the lands, a vested property interest.[12] In addition, section 1 explicitly states Congress' continuing plenary power over the entire Reservation:

> That the Northern Cheyenne Indian Reservation heretofore set apart by Executive order dated the 19th day of March, 1900, for the permanent use and occupation of the Northern Cheyenne Indians in Montana, be, and the same is hereby, declared to be the property of said Indians, subject to such control and management of said property as the Congress of the United States may direct. [emphasis added][13]

The Act's allotment provisions are contained entirely within section 2. This section authorizes limited, 160-acre allotments of agricultural and grazing lands to living tribal members. Allotment was to be consummated by the issuance of a trust patent designating the entire allotment as a homestead, inalienable for 25 years or until death of the allottee:

> Sec. 2. That the Secretary of the Interior be, and he is hereby, authorized to cause to be prepared a complete roll containing the names of all said Northern Cheyenne Indians now living, for whom said reservation was set apart as aforesaid, which roll, when approved by him, shall be the basis for allotting the land on said reservation as herein provided. The Secretary of the Interior shall also cause to be prepared, in such manner as he may deem advisable, a list of the lands of said Indian reservation and to classify same as agricultural, grazing, and land chiefly valuable for the timber thereon. As soon as practicable after the approval of said tribal roll and after the approval of said list of lands classified as above provided, the Secretary of the Interior is hereby authorized to allot

12. *See generally Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942); *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169 (1947); *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949) (dictum).

13. Page A-1, *infra*.

> in severalty lands classified as agricultural and grazing to duly enrolled Indians in areas not exceeding one hundred sixty acres to any individual from the lands appearing on said approved lists . . . *Provided*, That trust patents shall be issued therefor of the form and legal effect authorized by the Act of February 8, 1887 (Twenty-fourth Statutes at Large, page 388), as amended, and the lands so allotted and patented shall be designated in each case as a "homestead," which homestead shall remain inalienable and nontaxable for a period of twenty-five years from the date of issuance of patent therefor, or until the death of the allottee.[14]

The remainder of the 1926 Act is primarily concerned with identifying those portions of the Reservation immune from allotment—remaining, therefore, in the ownership of the Tribe. Section 3 excludes all reservation minerals and timber from allotment[15] and announces Congress' plan for transferring the minerals beneath each allotment to the allottee or his heirs after 50 years. Finally, this section explicitily asserts Congress' continuing plenary power over all property withheld from allotment. In addition, tribal leasing of those expressly-unallotted minerals and timber is authorized:

> Sec. 3. That the timber, coal or other minerals, including oil, gas, and other natural deposits, on said reservation *are hereby reserved for the benefit of the tribe* and may be leased with the consent of the Indian council under such rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That at the expiration of fifty years from the date of the approval of this Act the coal and other minerals, in-

14. Pages A-1-2, *infra*.

15. However, in 1947, by amendment to the Act, timber on the allotments was granted to the allottees. The 1947 Amendment made a present grant of the timber in the following terms: ". . . the timber on the allotments on the Northern Cheyenne Indian Reservation . . . are hereby declared to be the property of the allotees. . . ." Act of July 24, 1947, 61 Stat. 418 (page A-4, *infra*).

cluding oil, gas, and other natural deposits, of said allotment shall become the property of the respective allottees or their heirs:[16] *Provided further,* That the *unallotted* lands of said tribe of Indians shall be held in common, *subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians.* [emphasis added][17]

Section 4 enumerates additional portions of the Reservation which are withheld from allotment. It also provides that all income from the leasing of minerals and timber be held as tribal property—for the benefit of the Tribe as a whole. Section 5, the final section of the Act, deals exclusively with appropriations.

Allotments were not in fact made until 1932; approximately 53 per cent of the Reservation surface was ultimately allotted. The trust patent making an allotment provides in relevant part:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, has allotted, and by these presents does allot, unto the said Indian the above-described land as a Homestead, subject to all the provisions, conditions, limitations and restrictions contained in said Act of June 3, 1926. . . . *There is also reserved for the benefit of the Northern Cheyenne Indians, all the coal or other minerals, including oil, gas, and all natural deposits in said land.* [emphasis added][18]

From the time of allotment through the mid-1960s, tribal development of reservation minerals—envisioned by Con-

16. The 1926 Act specified "the allottees or their heirs" as recipients of this future allotment. However, in 1961, Congress amended the Act to add "devisees" to that group of prospective allottees. Act of September 22, 1961, 75 Stat. 586 (page A-5, *infra*).

17. Page A-2, *infra*.

18. Appendix at A-45-46.

gress in the 1926 Act[19]—had not occurred. However, in the late-1960s it became apparent that the Northern Cheyenne Tribe, might, for the first time, actually be in a position to develop its mineral resources. However, this potential development—which would occur through strip-mining—was fraught with serious ramifications; the continued existence of the Northern Cheyenne homeland and culture were put in question.[20] These circumstances led to the enactment of a 1968 amendment[21] to the Northern Cheyenne Allotment Act of 1926.

b. The 1968 Amendment to the Northern Cheyenne Allotment Act

The 1968 Amendment was based upon Congress' conclusion that it would violate the best interests of the Northern Cheyenne Tribe to carry through with the prior plan of transferring the minerals to the allottees, their heirs, or devisees in 1976; hence, Congress decided that all minerals

19. To this end, the 1926 Act authorized leasing of the minerals with the consent of the Tribal Council and provided that all income therefrom would be held in trust to be expended for the benefit of the Tribe. As stated by the House sponsor of the 1926 Act upon its passage:

> This is a very important bill to the Indians, because it not only provides an allotment of 160 acres to each member of the tribe, but it also preserves tribal grazing and timber land for the benefit of the entire tribe, and offers a means for the development of any mineral resources, such as oil, which may be discovered on the reservation, for the benefit of the tribe. In other words, it finally and fully confirms the title of the tribe in such a way as to develop their homes and give the Indians the fullest possible benefit of their natural resources. . . .

67 CONG. REC. 9886 (1926) (remarks of Representative Scott Leavitt—Montana).

20. *See* section 5, *infra*.

21. Act of July 24, 1968, 82 Stat. 424 (pages A-6-7, *infra*).

on the Reservation should continue to be tribally-owned.[22] Accordingly, Congress repealed the executory portion of its original Northern Cheyenne allotment plan. Section 3 of the 1926 Act was amended to read:

> Sec. 3(a) The coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved in perpetuity[23] for the benefit of the tribe and may be leased with the consent of the Indian council for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a-f, under such rules, regulations, and conditions as the Secretary of the Interior may prescribe.
>
> (b) The unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians.[24]

While Congress did in fact pass the 1968 Amendment above, it felt that this Amendment presented a particular

22. "If the mineral resources are reserved to the tribe in perpetuity, the income can be used for the benefit of all tribal members. If the minerals are allowed to become the property of the individual allottees, some persons will benefit greatly, and others will not benefit at all, depending upon where the minerals happen to be found." H.R. REP. No. 1292, 90th Cong., 2d Sess. 2 (1968); S. REP. No. 1145, 90th Cong., 2d Sess. 2 (1968).

23. The House of Representatives had originally proposed that the 1968 Amendment extend tribal ownership for an additional 50 years. However, this finite extension was rejected in favor of perpetual tribal ownership—for the following reasons:

> As amended and passed by the House, H.R. 5704 would reserve the minerals for the benefit of the tribe in perpetuity, rather than for an additional 42 years as provided in the original bill. This provision was recommended by the Department of the Interior because a reservation for the original 50 years plus an additional 42 years, a total of 92 years, at the end of which time the minerals become the property of the heirs of the original allottees, would create an extremely difficult and costly requirement for determining the heirs. Inasmuch as the purpose of the bill is to retain the title in the tribe until the minerals have been substantially extracted, it would be unreasonable to go through the heirship procedure.

S. REP. No. 1145, 90th Cong., 2d Sess. 2 (1968).

24. Act of July 24, 1968, 82 Stat. 424 (page A-6, *infra*).

constitutional question. In light of the Fifth Amendment, Congress was concerned that the 1926 Act[25] had possibly endowed the allottees, their heirs, or devisees with a vested, constitutionally-protected property right to the future distribution of the minerals. Thus, Congress made the effectiveness of the 1968 Amendment contingent upon the bringing of this suit to determine this issue.[26] Section 2 of the 1968 Amendment stipulates:

25. As amended in 1947 to allot timber (*see* note 15, *supra*) and as amended in 1961 to add devisees to the group of prospective allottees (*see* note 1, *supra*).

26. The original proponent of this litigation provision of the 1968 Amendment, the Department of Interior, recommended it only out of a desire to insulate absolutely the United States from the possibility of a damage claim by the allottees. On the merits of the legal issue, the Department stated:

> We believe that this problem is not one of great significance, because we believe that a sound argument can be developed which would support the proposition that this expectancy is not a compensable interest.

S. REP. No. 1145, 90th Cong. 2d Sess. 4 (1968). The House Committee on Interior and Insular Affairs retained the provision for the same reason, although believing that the extension of the minerals' reservation-period was within Congress' power. H. REP. No. 1292, 90th Cong. 2d Sess. 3 (1968).

Indeed, in 1961, Congress, without any hesitation whatsoever, amended the Northern Cheyenne Allotment Act in a manner which in three substantial respects diminished the allottees' future interest in the minerals (Act of September 22, 1961, 75 Stat. 588) (pages A-5-6, *infra*):

(1) the Tribe was given authority to encumber the future interest by entering into mining leases during the 50-year period of the minerals reservation, which could extend indefinitely beyond the year 1976;

(2) the class of persons holding the future interests in the minerals was changed; it was expanded from the "allottees or their heirs" to the "allottees or their heirs or devisees;" accordingly, ascertained and existing heirs of those original allottees who had made wills and died before the 1961 Amendment were divested of their future interests in the minerals—those interests being transferred by the Amendment to the devisees under the wills; and

(3) the allottees were divested of any right to convey their future interest in the minerals during the period of the 50-year reservation; and, all such conveyances made prior to the 1961 Amendment were nullified. Added Note: the district court ruled on September 30, 1971, that this case presents a justiciable case and controversy within the meaning of Article III, Section 2 of the United States Constitution. This ruling was not appealed.

The Northern Cheyenne Tribe is authorized to commence in the United States District Court for the District of Montana an action against the allottees who received allotments pursuant to the Act of June 3, 1926, as amended, their heirs or devisees, either individually or as a class, to determine whether under the provisions of the Act of June 3, 1926, as amended, the allottees, their heirs or devisees, have received a vested property right in the minerals which is protected by the fifth amendment. The United States District Court for the District of Montana shall have jurisdiction to hear and determine the action and an appeal from its judgment may be taken as provided by law. If the court determines that the allottees, their heirs or devisees, have a vested interest in the minerals which is protected by the fifth amendment, or if the tribe does not commence an action as here authorized within two years from the date of this Act, the first section of this Act shall cease to have any force or effect, and the provisions of section 3 of the Act of June 3, 1926, as amended by the Acts of July 24, 1947, and September 21 [*sic*], 1961, shall thereupon be carried out as fully as if section 3 had not been amended by this Act."[27]

c. Decisions Below

Invoking jurisdiction based upon the litigation provision above, the Northern Cheyenne Tribe commenced suit in United States District Court for the District of Montana against the allottees, their heirs or devisees, as a class. The district court ruled that Congress did have the power to amend the 1926 Act, concluding that this enactment bestowed upon defendants no vested property right in the minerals which is protected by the Fifth Amendment.[28] On appeal, the Ninth Circuit Court of Appeals reversed. Relying upon *Choate v. Trapp*, 224 U.S. 665 (1912), and certain rules of construction, the court concluded that Congress lacked power to amend the Act.[29]

27. Pages A-6-7, *infra*.

28. Petition for Certiorari at A-12-29.

29. *Id.* at A-1-11.

SUMMARY OF ARGUMENT

a. The Northern Cheyenne Allotment Act of 1926 provided for allotment of surface lands only; it did not allot Reservation minerals—instead, minerals were to be allotted 50 years hence.

b. This meaning of the 1926 Act is established by the Act's plain terms, which provide that all Reservation minerals "are hereby reserved for the benefit of the tribe" and provide that at 50 years' end, the minerals shall "become" the property of the allottees.

c. The plain meaning of the 1926 Act is completely corroborated by the circumstances surrounding the Act's passage and its legislative history. The Act was shaped by the following circumstances or influences contemporaneous with its enactment: (1) the long-held view of federal officials that the Northern Cheyenne were unprepared for full-scale allotment; (2) the growing reluctance of these officials to continue on with the largely unsuccessful allotment policy; and (3) the tribal desire—as expressed in a 1925 tribal petition to Congress—that only surface lands be allotted. The result was a very limited allotment act—the last initial allotment act ever to be enacted by Congress.

d. Accordingly, the actual allotment patents likewise convey surface lands *only*. These patents contain an express reservation of all minerals for the benefit of the Tribe. This carves out "a distinct estate consisting of the minerals. . . . for the benefit of the Tribe, it is tribal land, and is unallotted." ***British-American Oil Producing Co. v. Board of Equalization***, 299 U.S. 159, 164-65 (1936), ***rehearing denied***, 299 U.S. 624 (1937).

e. A vast coal deposit underlies the *entire* Northern Cheyenne Reservation. However, through the mid-1960s, the deposit remained undeveloped. Thereafter, the energy crisis and a combination of economic and environmental factors made strip-mining development of the coal reserve commercially feasible. However, such development, without proper control, posed a grave threat to the Northern Cheyenne homeland and people. In 1968, after concluding that only the Northern Cheyenne people *as a whole* should control—and benefit from—coal development, Congress amended the 1926 Act to preserve in perpetuity the tribal ownership of all Reservation minerals.

f. In enacting the 1968 Amendment, Congress was exercising its plenary power over Indian affairs—specifically, in altering its 1926 plan for the future allotment of the tribal minerals. A line of decisions of this Court, commencing in 1912 with *Gritts v. Fisher*, 224 U.S. 640, through *United States v. Jim*, 409 U.S. 80 (1972), firmly establishes Congress' power to amend statutory allotment plans "as might become essential or appropriate in view of changing conditions, the welfare of the Indians and the public interests." *United States v. Chase*, 245 U.S. 89, 100 (1917).

g. Congress' 1968 Amendment was also in accordance with the express terms of the 1926 Act, which explicitly reserve to Congress the power to control and manage unallotted lands.

h. This 1968 Amendment was decidedly not in conflict with *Choate v. Trapp*, 224 U.S. 665 (1912)—because the 1926 Act was not founded on contract; the 1926 plan for mineral allotment was yet unconsummated; and, the beneficiaries of the 1968 Amendment were the Northern Cheyenne tribal members as a whole.

ARGUMENT

1. The Plain Language of the 1926 Act Clearly Indicates That All Reservation Minerals Be Withheld From Allotment, Retained in Tribal Ownership, and Made Subject To Continuing Congressional Control. This Is Confirmed By the Language of the Allotment Patents.

a. *The Language of the 1926 Act*

The portion of the 1926 Act devoted to Reservation minerals and natural deposits, section 3, states explicitly that the minerals were not being allotted:

> That the timber, coal or other minerals, including oil, gas and other natural deposits, on said reservation *are hereby reserved* for the benefit of the tribe. . . . [emphasis added][30]

Moreover, section 3 stipulates that the allottees would acquire no property interest in Reservation minerals and natural deposits until 1976:

> *Provided*, That at the expiration of fifty years from the date of the approval of this Act the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall *become* the property of the respective allottees or their heirs. . . . [emphasis added]

Without question, the provision directly above simply announces a congressional plan to make a *future* transfer of minerals and natural deposits; at the time of that transfer—*but not until then*—an allottee acquires a property interest in the minerals. Until then, however, the minerals

30. Section 4 of the 1926 Act also uses the term "reserved" to insulate certain lands from allotment. This section provides that lands devoted to school, agency, cemetery, religious, recreational, and town-site purposes were to be "reserved" by the Secretary and concludes with the following language:

> *In addition to reservations heretofore herein authorized* the Secretary of the Interior shall *withhold from allotment* [tracts containing sources of drinking water for livestock]. [emphasis added]

and natural deposits remain completely in tribal ownership. Therefore, under the authorities discussed in depth in section 2 of this brief, *infra*, Congress *as a matter of law* retained plenary authority, during the ensuing 50-year period, to alter its plan for the ultimate disposition of that tribal property, if "essential or appropriate in view of changing conditions, the welfare of the Indians and the public interests." *United States v. Chase*, 245 U.S. 89, 100 (1917). *Accord, Chase, Jr. v. United States*, 256 U.S. 1, 7-8 (1921); *Sweet v. Schock*, 245 U.S. 192, 195-96 (1917); *United States v. Rowell*, 243 U.S. 464, 468 (1917).

The Act's remaining provisions make it clear that where Congress intended to create presently vested rights under the Act, it used language of a present grant. Thus, section 1 declares tribal ownership of the executive order Reservation in the following terms:

> That the Northern Cheyenne Indian Reservation heretofore set apart by Executive order . . . for the permanent use and occupation of the Northern Cheyenne Indians, in Montana, be, and the same *is hereby, declared to be* the property of said Indians. . . . [emphasis added]

In similar fashion, section 2 makes a present grant to each allottee of the right to select for allotment the lands he then occupied:

> The right *is hereby reserved* to any Indian to select as his allotment a tract occupied by him at the time of the approval of this Act. . . . [emphasis added]

Likewise, section 4 makes a present grant to the county of a power to designate easements for public highways:

> An area not exceeding sixty feet on either side of every section line within the said reservation *is hereby dedicated* as public highways whenever and so far as the same may be so declared by the county commissioners . . . and all allotments and patents hereby authorized shall be subject to the *easements hereby created*. [emphasis added]

That Congress intended to withhold minerals and natural deposits from allotment and retain them in tribal ownership is further verified by the provisions dealing with leasing and disposition of income of Reservation minerals and natural deposits. Section 3 vests exclusive leasing authority in the tribal council; section 4 provides that the income "shall be deposited in the Treasury of the United States to the credit of the Northern Cheyenne Indians and be subject to expenditure for their benefit in such manner as Congress may direct."[31]

Furthermore, twice within the Act—in sections 1 and 3—Congress explicitly declared its continuing plenary power over the lands withheld from allotment. Though these declarations of continuing power were not legally required to establish or preserve that power,[32] they indicate with certainty that Congress did not intend that individual rights fasten on the lands, minerals and natural deposits withheld from allotment. Indeed, the statement of reserved power in section 3 immediately follows, and clearly qualifies, the provision announcing the plan to transfer the minerals and natural deposits 50 years hence.[33] This portion of section 3 states:

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31. The legislative history shows that Congress specifically rejected per capita distribution of that income. *See* section 4c, *infra*.

32. *See* section 2a, *infra*.

33. The court below in fact conceded that under the 1926 Act "it is technically correct that the reservation to the tribe severs the minerals from the allotted lands, making them part of the unallotted tribal property, and thereby confers upon Congress the power to change the beneficiaries of such tribal lands." Petition for Certiorari at A-7 (footnote omitted). Despite this holding, the Ninth Circuit rejected the literal terms of

> That the timber, coal or other minerals . . . on said reservation are hereby reserved for the benefit of the tribe . . . *Provided*, That at the expiration of fifty years from the date of the approval of this Act the coal or other minerals . . . of said allotments shall become the property of the respective allottees or their heirs: *Provided further*, That the unallotted lands of said tribe shall be held in common, *subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians.* [emphasis added]

b. *The Language of the Allotment Patents*

It is also significant to note that the Act's plain meaning was thoroughly corroborated by the contemporaneous administrative construction of the Act. The trust patents by which allotments were consummated explicitly withheld minerals and natural deposits from allotment:

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the 1926 Act, relying instead on the constructional rule that "statutes passed for the benefit of the Indians are to be liberally construed and all doubts are to be resolved in their favor." Petition for Certiorari at A-8 (footnote omitted).

In applying this rule of construction, the court below cited decisions of this Court (*Squire v. Capoeman*, 351 U.S. 1 (1956), *Carpenter v. Shaw*, 280 U.S. 363 (1930), and *Choate v. Trapp*, 224 U.S. 665 (1912)); all of these decisions dealt with state and federal (*i.e., non-Indian*) attempts to tax allotments acquired by treaty or agreement. Within that particular context, this Court has held that the terms of applicable treaties, agreements, or statutes must be liberally construed in favor of the Indian allottees. However, it is improper to hold that these Supreme Court decisions require that the allottees be preferred over the tribe in the case at hand. Unlike the cases *Squire*, *Carpenter*, and *Choate* relied on by the Ninth Circuit, the case at hand does not involve an attempt by a non-Indian party, the government, to profit from encroachment upon an individual Indian's property rights. Rather, the instant case involves a conflict between two groups *both* of which contain Indians. Therefore, since it is not possible to favor either side under the rule (without disfavoring the other), the rule is inapplicable. To employ this rule of construction as did the court below defies logic and is indefensible. (In fact, since the respondent class includes a substantial number of nonmember Indians and whites (*see notes* 6 & 7, *supra*), if any rule of preference is to be applied, it should be "the settled rule that as between the whites and the Indians the laws are to be construed most favorably to the latter." *Cherokee Intermarriage Cases*, 203 U.S. 76, 94 (1906).)

> NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, has allotted, and by these presents does allot, unto the said Indian the above-described land as a Homestead, subject to all the provisions, conditions, limitations and restrictions contained in said Act of June 3, 1926. . . . *There is also reserved for the benefit of the Northern Cheyenne Indians, all the coal or other minerals, including oil, gas, and all natural deposits in said land.* [emphasis added][34]

This construction of the Act's meaning by the General Land Office, the agency responsible for executing the Act's terms, is entitled to substantial weight:

> While not conclusive, this construction given to the [allotment] act in the course of its actual execution is entitled to great respect and ought not to be overruled without cogent and persuasive reasons. *United States v. Moore*, 95 U.S. 760, 763; *Hastings & Dakota R.R. v. Whitney*, 132 U.S. 357, 366; *United States v. Hammers*, 221 U.S. 220, 225, 228; *Logan v. Davis*, 233 U.S. 613, 627.

LaRoque v. United States, 239 U.S. 62, 64 (1915).

To the same effect is *United States v. Jackson*, 280 U.S. 183, 193 (1930), which also deals with the construction of an allotment act:

> It is a familiar rule of statutory construction that great weight is properly to be given to the construction consistently given to a statute by the Executive Department charged with its administration. *United States v. Cerecedo Hermanos y Compania*, 209 U.S. 337; *Robertson v. Downing*, 127 U.S. 607; *United States v. Healey*, 160 U.S. 136; and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required. *United States v. Johnston*, 124 U.S. 236, 253; *Hawley v. Diller*, 178 U.S. 476, 488.[35]

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34. Appendix at A-45-46.

35. 280 U.S. at 193. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965).

Thus, in *Assiniboine & Sioux Tribes v. Nordwick*, 378 F.2d 426 (9th Cir. 1967), *cert. denied*, 389 U.S. 1046 (1968), the Ninth Circuit construed a 1927 allotment act by relying principally on the "virtually unbroken administrative practice" of not reserving oil and gas to the tribe in homestead patents:

> This practice seemingly reflects a uniform contemporaneous interpretation of the 1927 Act by persons presumably familiar with its background and purpose, and we are persuaded by it.[36]

Moreover, this Court's decision in *British-American Oil Producing Co. v. Board of Equalization*, 299 U.S. 159 (1936), *rehearing denied*, 299 U.S. 624 (1937), requires the conclusion that the minerals and natural deposits remained unallotted. *British-American* dealt with allotments under a 1919 amendment[37] to the Blackfeet Allotment Act of 1907.[38] This 1919 amendment (providing for further allotment of reservation lands) declared that all minerals in or under the lands to be allotted "are hereby reserved for the benefit of the Blackfeet Tribe." Subsequently, allotments under the 1919 amendment were consummated by the issuance of trust patents which explicitly reserved all minerals for the benefit of the Tribe. This Court held in part:

> The issuance of the trust patents containing, as the statute requires, a reservation for the benefit of the tribe of all minerals, including oil and gas, in or under the allotted land, operates to carve out of such land and create a distinct estate consisting of the minerals. This estate is in itself land, and, being reserved for the benefit of the tribe, it is tribal land, and is unallotted.[39]

36. 378 F.2d at 432.

37. Act of June 30, 1919, 41 Stat. 3, 16.

38. Act of March 1, 1907, 34 Stat. 1015, 1035.

39. 299 U.S. at 164-65.

Introduction to Section 2: Congress' Plenary Power Over the American Indian

Congress has long exercised power over the American Indian. Moreover, throughout the past nearly 200 years, the plenary nature of this power has become an axiom of congressional Indian legislation. To a large extent the federal plenary power over Indians emanates from the Constitution.[40] Yet, in addition, the courts have long recognized that this power implicitly flows from the "guardianship" exercised by the United States over the Indian. *Hallowell v. United States*, 221 U.S. 317, 324 (1911); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 418 (1866). This "guardian-ward" source of such plenary power is based upon the relative weakness and dependency of Indian tribes vis-a-vis the federal government.[41] Hence, from this relative weakness and dependency there flows "the duty of the United States to protect its wards, the Indians, and the consequent broad extent of its power over them and their affairs." *United States v. Jackson*, 280 U.S. 183, 190 (1930).

The plenary power of Congress over Indians and their affairs logically enough encompasses plenary power over tribal property. As this Court itself has stated: "It is thor-

40. Most significantly, Article I, section 8, clause 3 grants Congress the power "[t]o regulate Commerce . . . with the Indian Tribes." In one of the first important Indian cases in this country, Chief Justice Marshall himself recognized that the Constitution "confers on Congress the powers of war and peace; of making treaties, and of regulating commerce . . . with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. . . ." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

41. *See, e.g., United States v. Kagama*, 118 U.S. 375, 383-84 (1886). *See generally* Chambers, *Judical Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975).

oughly established that Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property." *Winton v. Amos*, 255 U.S. 373, 391 (1921). More specifically, this Court has decidedly recognized Congress' power to mandate the distribution of tribal property, including the allotment of such property to tribal members. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899). Congress' plenary power over Indian property also encompasses "authority to adopt measures to make the tribal property productive, and secure therefrom an income for the benefit of the tribe." *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307 (1902).

In light of such authority, Congress enacted the Northern Cheyenne Allotment Act of 1926.[42] Consistent with *Lone Wolf* and *Stephens*, Congress distributed surface lands to individual allottees;[43] consistent with *Cherokee Nation*, Congress retained minerals within the control of the Tribe, to be alloted 50 years hence.[44] Congress' subsequent 1968 amending of the Act altered this latter provision, continuing the tribal control of minerals in perpetuity.[45] That Congress' plenary power over tribal property includes such power to alter shall now be addressed.

2. Congress Retains Continuing Power To Alter Its Statutory Plans For the Distribution of Tribal Property To Tribal Members. It Was Under This Power That Congress Enacted the 1968 Amendment.

As established above, Congress possesses plenary power to enact plans for the allotment or distribution of tribal

42. Act of June 3, 1926, 44 Stat. 690.
43. *Id.* (at section 2.)
44. *Id.* (at section 3.)
45. Act of July 24, 1968, 82 Stat. 424.

property to tribal members. The issue in the instant case concerns the power of Congress to subsequently *alter* such a plan. This issue has been dealt with in a line of decisions of this Court, commencing in 1912 with *Gritts v. Fisher*, 224 U.S. 640, through the 1972 decision *United States v. Jim*, 409 U.S. 80. As shall be demonstrated, these authorities establish that the 1968 Amendment to the 1926 Northern Cheyenne Allotment Act was a proper exercise of this plenary congressional power.

Gritts v. Fisher involved the Cherokee Allotment Act of 1902.[46] This act provided for a complete dissolution of both tribal property and government. An initial allotment of tribal lands was to be made; subsequently, the tribal government was to be terminated and all remaining tribal funds were to be distributed to the original allottees. The 1902 act explicitly defined the class of persons eligible to participate in the initial allotments and the final distributions; moreover, all persons outside the class were specifically barred from sharing in those distributions. However, Congress in 1906 amended the act, significantly expanding the class of persons eligible for allotment and future distribution. Members of the original class of allottees brought suit, claiming that the 1906 amendment unconstitutionally impaired a vested property right to receive final distribution of all lands and funds not otherwise distributed under the 1902 act. This claim was denied by the Court on the ground that Congress retained plenary authority to alter its statutory plan for that final distribution:

> [I]t is said that the act of 1902 contemplated that [the original allottees] alone should receive allotments and be the participants in the distribution of

46. Act of July 1, 1902, 32 Stat. 716.

> the remaining lands, and also of the funds, of the tribe. No doubt such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting newly born members of the tribe to the allotment and distribution. The difficulty with appellants' contention is that it treats the act of 1902 as a contract, when "it is only an act of Congress and can have no greater effect." *Cherokee Intermarriage Cases*, 203 U.S. 76, 93. It was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued. *Stephens v. Cherokee Nation*, 174 U.S. 445, 488; *Cherokee Nation v. Hitchcock*, 187 U.S. 294; *Wallace v. Adams*, 204 U.S. 415, 423.[47]

In 1914 this Court decided *Sizemore v. Brady*, 235 U.S. 441, dealing with a congressional amendment of the Creek Allotment Act of 1901.[48] The 1901 act provided that allotments of tribal land be made to all Creeks living on April 1, 1899. A certain tribal member qualified for allotment under this standard; however, he died before an allotment could actually be made to him. Under such circumstances, the 1901 act provided that the allotment be made to his heirs under Creek law. However, before allotment could be made to these heirs, Congress amended the 1901 act to provide that the allotment be made to the heirs under Arkansas law. The heirs under Creek law brought suit, claiming that it was beyond Congress' constitutional power to divest them of their right, under the 1901 act, to the allotment. This Court denied this claim on the ground that Congress retained continuing power to amend its statutory allotment plan for the Creeks:

47. 224 U.S. at 648.

48. Act of March 1, 1901, 31 Stat. 861.

> The lands and funds . . . were tribal property and only as [the allotment and distribution were] carried into effect were individual claims to be fastened upon them. Unless and until that was done Congress possessed plenary power to deal with them as tribal property. It could revoke the agreement and abandon the purpose to distribute them in severality, or adopt another mode of distribution, or pursue any other course which to it seemed better for the Indians. . . . In short, the power of Congress was not exhausted or restrained by the adoption of the original agreement, but remained the same thereafter as before, save that rights created by carrying the agreement into effect could not be divested or impaired. *Choate v. Trapp*, 224 U.S. 665, 671.[49]

The principle of *Gritts v. Fisher* and *Sizemore v. Brady* was expressly applied by this Court in *United States v. Rowell*, 243 U.S. 464 (1917). *Rowell* involved the congressional enactment of a statute directing allotment of a specified tract to a tribal member. Prior to the issuance of the allotment patent, Congress discovered that the tract was far more valuable than had been originally believed; thus, the allotment act was repealed. This Court held that the repeal invaded no vested property rights. This holding was based on the following analysis:

> Congress was here concerned with the affairs of Indians whose tribal relation had not been dissovled—Indians who were still wards of the United States and entitled to look to it for protection. The plan of giving them individual allotments. . . . was obligatory on them, because it was adopted by Congress in the exercise of its control over them. . . . And Congress was free to exert this guardianship in any manner which it deemed appropriate, and to adjust its actions to new or changing conditions, so long as no fundamental right was violated.

49. 235 U.S. at 449-50.

> . . . And if, before that direction [to issue an allotment patent] was complied with, it was discovered that the land designated was lawfully devoted to a special use from which it could not be withdrawn with due regard for the tribe in general, or that its situation and value was such that to alter or to convey it to [Rowell] would invest [Rowell] with much more than a fair distributive share of the common property of the tribe, we think it was equally admissable for Congress to recall that direction in the interest of the tribe as a whole. At most that direction was but an exertion of the administrative control of the government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect. [footnote omitted][50]

In 1917 and 1920, respectively, this Court decided *United States v. Chase*, 245 U.S. 89, and *Nadeau v. Union Pacific R.R.*, 253 U.S. 442. Both cases sustained congressional action which altered prior schemes, established by treaty, for the distribution of tribal lands to members. *Chase* involved an 1865 treaty with the Omaha Tribe [51] which provided for assignments of tribal lands "for the exclusive use and benefit of [individual tribal members], their heirs and descendants. . . ."[52] In 1870 Chase received a certificate evidencing such an assignment. In 1882, however, Congress enacted a comprehensive allotment scheme which extinguished all rights under the treaty assignments.[53] Congress' action was upheld on the basis of the following analysis:

> Thus it is apparent . . . what was accomplished by the assignments under [the treaty] was merely a distribution or apportionment of the tribal right of occupancy, leaving the fee in the United States and leaving the United States and the tribe free to take such measures for the ultimate and permanent disposal of the lands, including the fee, as might become essential or appropriate in view of changing conditions, the welfare of the Indians and the public interests.[54]

50. 243 U.S. at 468-69.
51. Treaty with the Omaha Indians of Mar. 6, 1865, 14 Stat. 667.
52. 245 U.S. at 93.
53. Act of August 7, 1882, 22 Stat. 341.

Nadeau v. Union Pacific R.R. involved an 1861 treaty which provided for the allotment of tribal lands.[55] However, in 1862 Congress enacted a statute which made possible a railroad right-of-way through the reservation.[56] Thereafter, in 1863, actual allotment under the treaty provisions commenced. This Court held that allotments under the 1861 treaty were subject to the right-of-way granted by the 1862 statute. This holding was based upon the following analysis:

> It seems plain that, at least, until actually allotted in severalty . . . the lands were but part of the domain held by the Tribe under the ordinary Indian claim—the right of possession and occupancy—with fee in the United States. *Beecher v. Wetherby*, 95 U.S. 517, 525. The power of Congress, as guardian for the Indians, to legislate in respect of such lands is settled. *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U.S. 641, 653; *United States v. Rowell*, 243 U.S. 464, 468; *United States v. Chase*, 245 U.S. 89.
>
> The grant of the right of way in 1862, was present and absolute and, upon identification of the route took effect as of the date of the act. All who thereafter acquired public lands took subject to such granted right. *Railroad Company v. Baldwin*, 103 U.S. 426, 430. Although parties to the Treaty of 1861 contemplated future allotments, it made none. No individual title to any portion of the land arose until allotted, and none was allotted until after 1862.[57]

In 1921, the holding in *United States v. Chase, supra*, was

54. 245 U.S. at 99-100.
55. Treaty with the Pottawatomies of Nov. 15, 1861, 12 Stat. 1191.
56. Act of July 1, 1862, 12 Stat. 489.
57. 253 U.S. at 445-46.

extended one step further by *Chase, Jr. v. United States,* 256 U.S. 1 (1921). *Chase, Jr.* also involved Omaha allotments; it considered whether Congress could lawfully extinguish allotment rights under the above-described 1882 statute and an 1893 amendment.[58] This issue arose as a result of Congress' 1912 enactment of a statute[59] which repealed the 1882 and 1893 allotment legislation. Hiram Chase, Jr. contended that the 1912 statute could not lawfully divest him of rights to allotment which had accrued under the 1882 and 1893 acts. This Court denied Chase, Jr.'s claim in the following terms:

> The contention is one that has often been made in this Court and rejected as often as made. *Gritts v. Fisher,* 224 U.S. 640; *Choate v. Trapp,* 224 U.S. 665; *Cherokee Nation v. Hitchcock,* 187 U.S. 294. In those cases the relation of the individual Indian to the tribal property is explained and also the power of Congress over that property and the tribes. In the recent case of *United States v. Chase,* 245 U.S. 89, we had occasion to consider the Reservation here involved and the effect of Article IV of the treaty of 1865 relied on by the appellant, and decided that its purpose was to do no "more than to individualize the existing tribal right of occupancy" and that it left "the fee in the United States" and left "the United States and the tribe free to take such measures for the ultimate and permanent disposal of the lands, including the fee, as might become essential or appropriate in view of changing conditions, the welfare of the Indians, and the public interests."
>
> The case dealt with assignments under Article IV, but its principle necessarily applies to a mere right under the Act of 1882.[60]

58. Act of March 3, 1893, 27 Stat. 612, 630.

59. Act of May 11, 1912, 37 Stat. 111.

60. 256 U.S. at 7-8.

In 1939, the above principles were applied to *Chippewa Indians v. United States,* 307 U.S. 1, a case strongly analogous to the case at hand. *Chippewa Indians* involved a damage suit brought on behalf of a class of Chippewas.[61] The class consisted of all those Chippewas who were to share in the final distribution of a permanent fund. This fund was created in 1889 when Congress enacted a comprehensive act dealing with the affairs of the Chippewas.[62] Explicitly, the fund was to consist of proceeds from the sale of tribal lands and timber. In addition, section 7 of the 1889 act provided that the fund be held for 50 years and then distributed in equal shares to the members of the class—the class consisting of all Chippewas and their issue living at the expiration of the 50-year period. The act further provided that during this 50-year period, Congress could only make very limited expenditures from the fund; no more than five per cent could be spent for "civilization and self-support."[63] Plaintiffs contended that subsequent acts of Congress, authorizing expenditures from the permanent fund substantially in excess of those permitted by the 1889 act, invaded the remaindermen's vested rights to distribution of the principal at the end of the 50-year period.[64]

61. The suit was brought under a special jurisdictional act (Act of May 14, 1926, 44 Stat. 555, as amended by the Act of April 11, 1928, 45 Stat. 423, and the Act of June 18, 1934, 48 Stat. 979) which provided that the plaintiffs "shall be considered to share in the final distribution of the permanent fund provided for by section 7 of the Act of January 14, 1889 (25 Stat. L. 642)...."

62. Act of January 14, 1889, 25 Stat. 642.

63. *Id.* at 645. The interest earned by the fund was, however, to be fully expended during the 50-year period for the benefit of the Indians. 25 Stat. 642, 645.

64. These subsequently authorized expenditures are detailed throughout the Court of Claims' opinion. *Chippewa Indians v. United States,* 88 Ct.Cl. 1 (1938).

> The appellants assert that, by the Act of 1889, Congress abdicated its plenary power of administration of the Chippewas' property as tribal property . . . and agreed to hold the proceeds of the ceded lands in strict and conventional trust for classes of individual Indians in accordance with the program outlined in the Act.
>
> In this view the living Chippewas are beneficiaries of the income of the fund during the fifty year period, and individual Chippewa Indians who may be living at the expiration of the period, as a class, are remaindermen.[65]

The above claim was denied by this Court in the following terms:

> [The 1889] Act contemplates future dealings with the Indians upon a tribal basis. It exhibits a purpose gradually to emancipate the Indians and to bring about a status comparable to that of citizens of the United States. But it is plain that, in the interim, Congress did not intend to surrender its guardianship over the Indians or treat them otherwise than as tribal Indians.
>
> . . . Moreover, an examination of the Act of 1889 discloses that it is not cast in the form of an agreement; and, we may not assume that Congress abandoned its guardianship of the tribe or the bands and entered into a formal trust agreement with the Indians, in the absence of a clear expression of that intent.
>
> . . . .
>
> We hold that the Act did not tie the hands of Congress so that it could not depart from the plan envisaged therein, in the use of tribal property for the benefit of its Indian wards.[66]

Most recently, in 1972, this Court decided yet another case strongly analogous to the case at hand—namely, *United States v. Jim*, 409 U.S. 80. The *Jim* facts were as follows:

65. 307 U.S. at 3.

66. 307 U.S. at 4-5.

lows: in 1933 Congress provided for the annexing to the Navajo Indian Reservation of two separate tracts in San Juan County, Utah, known collectively as the Aneth Extension.[67] Inhabiting the isolated Aneth Extension—as it had for generations—was a distinct group of primitive Navajo and Piute sheepherders.[68] The Navajo Tribe had sought annexation of the tracts for grazing purposes only; the Tribe was not specifically interested in oil deposits that might be located on the tracts, as it believed that no viable reserves existed.[69]

Explicitly, the 1933 annexing act provided that the annexed lands were to be set aside specifically for the benefit of the Indians then resident thereon (the group of Navajo and Piute sheepherders) and any other Indians that the Secretary of the Interior might see fit to locate there. Moreover, the act prohibited any Indian homesteading or future allotment of lands within San Juan County, the county containing the Aneth Extension. Finally, the act provided that should oil and/or gas be developed, 37½ per cent of the net royalties were to be expended for the benefit of the Indian residents of the Extension. Subsequently, oil was developed in lucrative quantities.[70]

Through 1968 the Secretary of the Interior had not located any additional Indians on the Aneth Extension,[71] and the Indian residents thereon continued to consist of that

67. Act of March 1, 1933, 47 Stat. 1418.

68. 409 U.S. at 86; unreported District Court findings of fact; finding no. 12.

69. S. Doc. No. 64, 72d Cong., 1st Sess. 39-40, and, in general 38-44, 57-58, 77, 118 (1933).

70. By 1970, over $7,000,000 in royalties were owing to the Aneth residents. 409 U.S. at 84; Appellees, Motion To Affirm and Brief In Support Thereof at 5.

71. Unreported District Court findings of fact; finding no. 10.

distinct group of Navajo and Piute sheepherders and their descendants, numbering approximately 1,500.[72] However, in 1968, Congress amended the 1933 act to provide that the 37½ per cent net royalties be expended for the benefit of *all* Navajo Indians residing in San Juan County.[73] This amendment had the following effects: it expanded the size of the class of beneficiaries from 1,500 to 15,000 persons[74] and it excluded the Piutes from the class of beneficiaries.[75]

The Aneth Extension residents attacked the 1968 amendment on the ground that it deprived them of a vested right, under the 1933 act, in 37½ per cent of the net royalties. Their claim was denied by this Court, per curiam, in the following terms:

> Congress in 1933 did not create constitutionally protected property rights in the [Aneth Extension community]. The Aneth Extension was added to a tribal reservation, and the leases which give rise to mineral royalties are tribal leases. It is settled that "[w]hatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members." *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307; *Delaware Indians v. Cherokee Nation*, 193 U.S. 127, 136. To be sure, the 1933 Act established a pattern of distribution which benefited the [Aneth community] more than any other Indians on the Navajo Reservation. But it was well within the power of Congress to alter that distributional scheme. [footnotes omitted][76]

This Court then went on to indicate its reliance on *Gritts v. Fisher, supra,* and stated in conclusion:

> Congress has not deprived the Navajo of the benefits of mineral deposits on their tribal lands. It has merely chosen to re-allocate the 37½% of royalties which flow through the State in a more efficient and equitable manner. This was well within the power of Congress to do. As no "property," in a Fifth Amendment sense, was conferred upon residents of the Aneth Extension by the 1933 Act, no violation of the Fifth Amendment was effected by the 1968 legislation.[77]

72. Unreported District Court findings of fact; finding nos. 1, 12; 409 U.S. at 84.

73. Act of May 17, 1968, 82 Stat. 121.

74. Appellees' Motion To Affirm and Brief In Support Thereof at 8.

75. Unreported District Court findings of fact; finding no. 18.

76. 409 U.S. at 82.

77. *Id.* at 83. The general principle relied on above has also been applied by the U.S. Court of Claims in the following two recent cases: *Klamath and Modoc Tribes v. United States,* 436 F.2d 1008 (Ct. Cl. 1971), *cert. denied sub nom.*, 404 U.S. 950 (1971); and *Fort Peck Indians v. United States,* 132 F.Supp. 222, 132 Ct. Cl. 373 (1955).

Klamath and Modoc Tribes involved the Klamath Termination Act of 1954 (Act of August 13, 1954, 68 Stat. 718) which permitted a tribal member to withdraw from the tribe and have his interest in tribal property commuted to money and paid to him no later than a specified date (section 6(b)). Subsequently, however, Congress amended the act to postpone that date; Congress also imposed additional burdens on the manner in which the tribal assets were to be sold to satisfy the claims of withdrawing members. A class of withdrawing members brought suit, alleging that the postponement of the distribution and the imposition of additional burdens on the process deprived them of individual vested property rights which were secured to them by the 1954 act. This claim was denied in the following terms:

> These parties contend that the passage of the 1954 Act gave the withdrawing tribal members vested property interests not subject to later Congressional modification or defeasance, and that the failure of Congress to follow through on the initial 1954 plan constituted such a gross interference with these firm rights of the withdrawing Indians as to constitute a taking.
>
> . . . .
>
> We would, in any event, be loath to adopt the argument that the mere passage of the original Termination Act gave the Anderson plaintiffs immutable rights. That rule would in effect freeze Congress into a position once taken and deny it the right to accomodate its Indian enactments, within a short time, to changed circumstances . . . . Courts should not look with squinty eyes at such bona fide modification of Indian legislation to fit changed or newfound circumstances, especially where it is obvious, as in this instance, that the whole matter is still in flux and that individual rights have not yet become firm or settled in any realistic sense.

436 F.2d at 1021.

Another recent case, *Fort Peck Indians*, involved a congressional alteration of the Fort Peck Allotment Act of 1908 (Act of May 30, 1908, 35 Stat. 558). The 1908 act provided for the sale of surplus tribal lands at appraised values, under specified terms of payment (sections 4-11). The proceeds of those sales, less expenses, were to be "allotted in severalty to the members of the tribe" at a specified date (section 15). Lands were

The above-discussed principle of congressional power to alter has not been confined to narrow application; to the contrary, the principle has been applied to sustain a variety of congressional alterations to prior allotment acts. For example, against Fifth Amendment attack this Court has upheld revisions to allotment legislation having the effect of extinguishing prior statutory eligibility for allotment. In *Stephens v. Cherokee Nation,* 174 U.S. 445 (1899), the original allotment act[78] provided that a commission would establish the roll of tribal members entitled to allotments; persons aggrieved by a decision of that commission might appeal to the United States District Court and "the judgment of the court shall be final." Pursuant to this statute, the United States District Court made final determinations of allotment eligibility. Subsequently, Congress amended the original allotment act to permit further judicial review in the Supreme Court of these determinations, which previously had been branded as final under the original act.[79] It was contended that this amendment invaded vested rights to allotment which had previously accrued under the original act. This claim was rejected in the following terms:

> [N]or can the act be properly regarded as destroying any vested right, since the right asserted to be vested is only the exemption of these judgments from review,

accordingly appraised and sold. However, subsequently, in accordance with congressional authorization (Act of June 6, 1912, 37 Stat. 125, 43 U.S.C. §1196 (1970)), the Secretary of the Interior reduced the sale prices of certain of these surplus lands; also, he permitted the purchasers to defer payment of the purchase price. The Court of Claims sustained these deviations from the terms of the 1908 act on the ground that "notwithstanding the terms of this Act, Congress retained plenary power to deal with the Indian lands in such a manner as it thinks is for the benefit of the Indians." 132 F.Supp. at 223.

78. Act of June 10, 1896, 29 Stat. 321.

79. Act of July 1, 1898, 30 Stat. 571, 591.

> and the mere expectation of a share in the public lands and moneys of these tribes . . . cannot be held to amount to such an absolute right of property. . . .[80]

Wallace v. Adams, 204 U.S. 415 (1907), upheld on this reasoning a further amendment[81] to the allotment act involved in *Stephens,* establishing yet another mechanism for nullifying prior determinations of eligibility for allotment which had been termed "final" under the original version of the allotment act. *See also Lowe v. Fisher,* 223 U.S. 95 (1912).

Additionally, there is a very substantial line of decisions of this Court enforcing allotment act amendments extending or reimposing restrictions on the allottee's ability to alienate his allotment. *Tiger v. Western Investment Co.,* 221 U.S. 286 (1911) (extension sustained against Fifth Amendment attack); *Heckman v. United States,* 224 U.S. 413 (1912) (extension sustained following *Tiger*); *Goat v. United States,* 224 U.S. 458 (1912) (extension enforced); *United States v. Bartlett,* 235 U.S. 72 (1914) (reimposition enforced); *Brader v. James,* 246 U.S. 88 (1918) (reimposition sustained against Fifth Amendment attack); *United States v. Jackson,* 280 U.S. 183 (1930) (extension sustained against Fifth Amendment attack).[82]

Sweet v. Schock, 245 U.S. 192 (1917) is another decision of this Court sustaining, against Fifth Amendment attack, a subsequent congressional divestment of privileges provided under a prior allotment act. The allottee received

80. 174 U.S. at 478.

81. Act of July 1, 1902, 32 Stat. 641.

82. *See also Williams v. Johnson,* 239 U.S. 414 (1915), which sustained the cutting short of a restriction against Fifth Amendment attack.

an allotment which, under the applicable allotment act[83] and under the terms of the allotment patent issued, was immune from taxation for 21 years. Subsequently, Congress enacted a series of statutes[84] which granted a limited right to alienate the allotment, but exacted in return for the exercise of that right an extinguishment of the tax immunity. This Court upheld that extinguishment of the tax immunity against Fifth Amendment attack, declaring it a permissible part of Congress' necessary "[a]ccommodation to new conditions. . . ."[85]

The general legal principle upon which the foregoing decisions rest was well articulated in a 1937 opinion of the Solicitor of the Department of the Interior, *The Constitutional Power of Congress To Enact Legislation Concerning the Allotment of Lands to the Mission Indians of California.*[86] This opinion expressly dealt with the issue of whether "the individual members of the bands or villages of Mission Indians acquired vested rights by enactment of the [allotment] legislation sought to be repealed so that Congress could not thereafter recall or impair such rights without violating the due process clause of the Fifth Amendment to the Federal Constitution."[87] Citing *Gritts v. Fisher*, 224 U.S. 640 (1912), *Sizemore v. Brady*, 235 U.S. 441 (1914), and *Chase, Jr. v. United States*, 256 U.S. 1 (1921), the Solicitor concluded:

> The foregoing decisions clearly establish that acts of Congress looking to the allotment in severalty of such

83. Act of March 1, 1901, 31 Stat. 861, and Act of June 30, 1902, 32 Stat. 500.

84. Act of March 3, 1903, 32 Stat. 982, 996; Act of April 26, 1906, 34 Stat. 137; Act of May 27, 1908, 35 Stat. 312.

85. 245 U.S. at 195.

86. 56 I.D. 102.

87. *Id.*

> lands do not, of their own force, create any vested right in any individual Indian. Until such acts of Congress have been carried into effect to the extent of creating vested property rights in the individual Indians, the reservation lands remain in tribal ownership subject to the undisputed power of Congress to deal with them as such.[88]

a. *While the 1926 Act (§§ 1 & 3) Contains Express Reservations of Congress' Power To Amend That Statutory Allotment Plan, Such Reservations Were Not Legally Required.*

The court below held that in order for Congress to preserve its power to amend the 1926 Act, "a clear expression of Congress' retained power" must be included in the Act.[89] No cases were cited for that proposition. Moreover, the court's holding was in conflict with decisions of this

88. *Id.* at 106. *See also Clark, Jr. v. Benally*, 51 I.D. 91 (1925), *aff'd on rehearing*, 51 I.D. 98 (1925); *Assiniboine and Sioux Tribes v. Nordwick*, 378 F.2d 426 (9th Cir. 1967), *cert. denied*, 389 U.S. 1046 (1968) (although Congress had provided for the allotment of lands, including the minerals thereunder, it could subsequently amend that act to reserve minerals from allotment); *Hopkins v. United States*, 414 F.2d 464 (9th Cir. 1969) and *Finch v. United States*, 387 F.2d 13 (10th Cir. 1967) (subsequent congressional emasculation of statutory provisions for public land allotments to Indians sustained).

89. The court below reasoned that in three other allotment acts, the Fort Belknap, Crow and Osage allotment acts, it was expressly stated therein that Congress retained the power to alter the allottee's expectancy in the minerals beneath his allotment. From this observation, the court made the following presumption: "The rather conspicuous omission of such language from a statute dealing with the same subject as those other allotment acts indicates that Congress intended to create rights in the Northern Cheyenne allottee different from those in the other allotment statutes." Petition for Certiorari at A-6-7.

However, careful analysis of these other allotment acts reveals: (1) they are generically different from the 1926 Act (*see* section 4d, *infra*); (2) the legislative histories of the Crow and Osage acts reveal that the express provisos were *not* viewed by Congress as essential to preserving the inherent congressional power to alter the allottee's expectancy in the minerals; and (3) neither the Fort Belknap, Crow nor Osage acts contain the all-encompassing statements of reserved power found in sections 1 and 3 of the Northern Cheyenne Act.

Court which establish that no reservation of power whatsoever is necessary.

Congress possesses plenary power to adjust enacted schemes for the allocation of tribal property "as might become essential or appropriate in view of changing conditions, the welfare of the Indians and the public interests." *United States v. Chase,* 245 U.S. 89, 100 (1917). *Accord, Chase, Jr. v. United States,* 256 U.S. 1, 7-8 (1921); *Sweet v. Schock,* 245 U.S. 192, 195-96 (1917); *United States v. Rowell,* 243 U.S. 464, 468 (1917). This power is fundamental, inherent in Congress' role as guardian of Indian people,[90] and not subject to relinquishment so long as that guardianship subsists. *United States v. Jackson,* 280 U.S. 183, 190 (1930).

That Congress need not specifically reserve an amendatory power in its statutory plans for the distribution of tribal property is clear from the following decisions of this Court. In each of them, an alteration of a statutory plan of distribution is sustained despite the *lack* of a specific reservation of power to alter. *United States v. Jim,* 409 U.S. 80 (1972); *United States v. Jackson, supra; Brader v. James,* 246 U.S. 88 (1918); *Sweet v. Schock, supra; Sizemore v. Brady,* 235 U.S. 441 (1914); *United States v. Bartlett,* 235 U.S. 72 (1914); *Gritts v. Fisher,* 224 U.S. 640 (1912); *Goat v. United States,* 224 U.S. 458 (1912); *Heckman v. United States,* 224 U.S. 413 (1912); *Lowe v. Fisher,* 223 U.S. 95 (1912); *Tiger v. Western Investment Co.,* 221 U.S. 286 (1911); *Wallace v. Adams,* 204 U.S. 415 (1907).

For example, in *Gritts v. Fisher* the original allotment

90. *See* note 41, *supra.*

act expressly barred children born after a specified date from a class of allottees, yet this Court sustained an amendment which expanded the class to include those previously excluded children.

Introduction to Section 3

While, as demonstrated above, Congress has plenary power to alter *executory* portions of statutory allotment plans, it is fully conceded that Congress may not strip away rights which have vested in tribal members through *consummated* allotments arising from contract. This Fifth Amendment limitation on congressional power arises from the case *Choate v. Trapp,* 224 U.S. 665 (1912), explicated below.

3. The 1968 Amendment Does Not Violate the Rule of *Choate v. Trapp*—That Congress May Not, Consistent With the Fifth Amendment, Deprive Tribal Members of Property Rights Which They Have Acquired Through the Consummation of Statutory Allotment Plans Founded on Contract.

The decision of the court below rests fundamentally on an interpretation of *Choate v. Trapp,* 224 U.S. 665 (1912). The Ninth Circuit interpreted the holding in *Choate* as completely insulating the Northern Cheyenne allottees' mineral expectancy, under the terms of the 1926 Act, from congressional alteration. Because of the preeminence of *Choate* in the Ninth Circuit's reasoning, this case will now be discussed in substantial depth.

a. *The Factual Background of* Choate v. Trapp

Choate involved the Choctaw and Chickasaw Tribes, two of the Five Civilized Tribes.[91] Through the early 1830s,

91. The Five Civilized Tribes consist of the Cherokee, Choctaw, Chickasaw, Creek and Seminole Tribes.

these tribes had occupied vast southern territories east of the Mississippi River.[92] During the 1830s, however, treaties were negotiated which provided for the removal of these tribes west of the Mississippi. These treaties made two basic guarantees to the Indians as to their new lands: (1) tribal titles were to be perpetual and in fee; and (2) no territorial or state governments were to be imposed upon the new territory.[93] This new territory, to be known as the "Indian Territory," initially consisted of all of the present state of Oklahoma, except the panhandle portion. Subsequently, because of their Civil War alliances with the Confederacy, the tribes were forced to relinquish the western half of the Territory—other Indian tribes were settled on a portion of this land, and the remainder of this land became the open Territory of Olkahoma. The Choctaws and Chickasaws, who were closely related, came to jointly own approximately 11,650,000 acres of the Indian Territory.[94]

A tide of white immigration into the Indian Territory commenced after the Civil War, and by 1890 the Indians constituted less than one-third of the population in the Territory.[95] The majority white population, to expedite white acquisition of the Indian lands, began intensively urging the federal government to abolish the tribal govern-

92. The Cherokees, Creeks, Choctaws and Chickasaws occupied twenty-five million acres in northeast Georgia, western North Carolina, south a Tennessee, eastern Alabama, and the northern two-thirds of Missi ppi. Young, *Indian Removal and Land Allotment: The Civilized Tribes and Jacksonian Justice*, LXIV AM. HISTORICAL REV. 33 (1958).

93. A. DEBO, AND STILL THE WATERS RUN—THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 5 (1972 ed.). (And, *see generally*, G. FOREMAN, INDIAN REMOVAL—THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS (1932).)

94. *Id.* at 6.

95. BUREAU OF THE CENSUS, EXTRA CENSUS BULLETIN, THE FIVE CIVILIZED TRIBES OF THE INDIAN TERRITORY 3-5 (1894).

ments and to transform the communal system of landholding into individual tenure. The whites' ultimate object was the creation of the State of Oklamoma.[96]

Congress responded with the Act of March 3, 1893,[97] creating the Commission to the Five Civilized Tribes (which became universally known as the Dawes Commission). The Commission's task was to negotiate with the tribes to obtain extinguishment, through cession or allotment, of all tribal title to lands within the Indian Territory, so as "to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory."[98] The Indian nations adamantly resisted negotiation with the Commission.[99] Finally, however, in 1897 the Commission succeeded in reaching an agreement —the Atoka Agreement—with the Choctaw and Chickasaw.

The following year Congress approved that agreement with modifications, and provided that the modified Atoka Agreement would be effective if ratified at general tribal elections to be held by the Choctaw and Chickasaw.[100] After congressional and tribal ratification, the fully-ratified Atoka Agreement provided:

> That all the lands within the Indian territory belonging to the Choctaw and Chickasaw Indians shall be allotted to the members of said tribes. . . .
>
> . . . .
>
> All the lands allotted shall be non-taxable while the

96. A. DEBO, AND STILL THE WATERS RUN—THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 19-23 (1972 ed.).

97. 27 Stat. 612, 645.

98. *Id.*

99. A. DEBO, AND STILL THE WATERS RUN—THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 23-24, 27-30, 32-33 (1972 ed.)

100. Act of June 28, 1898, 30 Stat. 495, 505.

> title remains in the original allottee, but not to exceed twenty-one years from date of patent. . . .[101]

The Atoka Agreement further provided that upon completion of allotments, patents were to be delivered to the allottees:

> Said patents shall be framed in accordance with the provisions of this agreement . . . and the acceptance of his patents by such allottee shall be operative as an assent on his part to the allotment and conveyance of all the lands of the Choctaws and Chickasaws in accordance with the provisions of this agreement, and as a reliquishment of all his right, title, and interest in and to any and all parts thereof, except the land embraced in said patents. . . .[102]

b. *Particular Facts Giving Rise to Choate v. Trapp*

Carved from the Indian Territory, Oklahoma was admitted to the Union in 1907, with a constitution specifically disclaiming any right in the state to limit or impair the federally secured tax exemptions of Indians.[103] The white populace of Oklahoma, however, chafing at the restricted alienability of Indian lands and the lands' tax immunity, lobbied intensely for federal legislation which would ameliorate these concerns.[104]

This lobbying resulted in the Act of May 27, 1908[105] which made sweeping releases of restrictions on the alienability of allotted lands, and, declared the now-unrestricted lands to be subject to state taxation. Immediately, on the

101. 30 Stat. 495, 505, 507.

102. *Id.* at 507-08.

103. *Choate v. Trapp*, 224 U.S. 665, 670 (1912) (hereinafter cited as "224 U.S. at . . .").

104. A. DEBO, AND STILL THE WATERS RUN—THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 126-58, 164-65, 168-80 (1972 ed.).

105. 35 Stat. 312.

authority of this act, Oklahoma commenced taxation of all unrestricted allotted lands. However, believing that they possessed a vested property right to the tax immunity, not subject to divestment by the federal government, Choctaw and Chickasaw allottees brought suit in state court to enjoin assessment of their lands.[106] The Oklahoma Supreme Court denied the Indian claims; however, this Court reversed.[107]

c. *The Decision of This Court in* Choate v. Trapp

Choate held that Congress' attempt to divest the allottees of the Atoka Agreement tax immunity, fully conveyed to the allottees by allotment patents, ran afoul of the Fifth Amendment. This holding was founded on the following analysis:

(1) The tax immunity had been secured to the allottees under agreement with the United States, fully ratified by the Indians and Congress,[108] in which the tribes parted with very substantial consideration,[109] and each allottee individually agreed that the acceptance of his allotment patent would be deemed an agreement by him to allotment of all tribal lands and a relinquishment by him of his entire equitable interest in substantially all of the common prop-

106. *Choate v. Trapp*, 28 Okla. 517, 114 Pac. 709 (1911). In addition, Creek allottees brought similar suit in *English v. Richardson*, 28 Okla. 408, 114 Pac. 710 (1911), and other Choctaw allottees in *Gleason v. Wood*, 28 Okla. 402, 114 Pac. 703 (1911).

107. This Court also reversed *English* and *Gleason* (*id.*) in very brief opinions holding that *Choate* was fully dispositive. *English v. Richardson*, 224 U.S. 680 (1912); *Gleason v. Wood*, 224 U.S. 679 (1912).

108. Act of June 28, 1898, 30 Stat. 495; Act of July 1, 1902, 32 Stat. 641.

109. The tribes relinquished their fee titles to millions of acres of land and thus expedited the creation of the State of Oklahoma. 224 U.S. at 667.

erty of the tribe, a relinquishment specifically desired by Congress.[110]

(2) At the time of the 1908 federal act divesting the tax immunity, substantially all of the allotment patents had been delivered to the allottees.[111]

> Upon delivery of the patent the agreement was *executed*, and the Indian was *thereby* vested with all the right conveyed by the patent, and, like a grantee in a deed poll, or a person accepting the benefit of a conveyance, bound by its terms. . . .[112]

This Court then reasoned:

> As the plaintiffs were offered the allotments on the conditions proposed; as they accepted the terms and, in the relinquishment of their claim, furnished a consideration which was sufficient to entitle them to enforce whatever rights were conferred, we are brought to a consideration of the question as to what those rights were.[113]

(3) The nature of the rights transferred through the issuance of the patent was the determined. This Court noted that the Atoka Agreement provided that all patents "shall be framed in accordance with the provisions of this agreement."[114] Accordingly, the patents "made a grant of land which should be non-taxable. . . .",[115] in addition, the patents issued under the agreement conveyed an exemption which is "attached to the land. . . ."[116]

The patent issued in pursuance of those statutes gave

110. 224 U.S. at 669, 671.

111. 224 U.S. at 670.

112. 224 U.S. at 672 (emphasis added).

113. *Id.*

114. 30 Stat. 507; 224 U.S. at 669, 672, 673.

115. 224 U.S. at 673.

116. 224 U.S. at 675-76.

> the Indian as good a title to the exemption as it did to the land itself. Under the provisions of the Fifth Amendment there was no more power to deprive him of the exemption than of any other right in the property. No statute would have been valid which reduced his fee to a life estate or attempted to take from him ten acres, or fifty acres, or the timber growing on the land.[117]

(4) Additionally, this Court in *Choate* relied heavily on the analysis of Chief Justice Marshall in *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164 (1812), which was identified as being "directly in point here and especially as to the quality of the exemption."[118]

Wilson is indeed very much in point. As does *Choate*, the *Wilson* case deals with the question of governmental power[119] to subsequently divest Indian lands[120] of a real property tax exemption secured to them under an executed agreement with the government. The Indians had claimed a considerable portion of the lands of New Jersey, and the colonial government desired to extinguish that claim. To that end, an agreement was negotiated between the Indians and the government, and confirmed by the legislature, providing for the government's purchase of a parcel of land for the Indians, which would thereafter be immune from taxation; in consideration, the Indians would release their claim to other lands in the state. This agreement was executed—lands were conveyed to the Indians and the Indians relinquished their claim to the other lands. Subsequently,

117. 224 U.S. at 673-74.

118. 224 U.S. at 676.

119. In this case, state power was at issue. Since the state does not possess the plenary power of guardianship over Indian affairs possessed by the federal government, its actions affecting Indian property rights would be judged more severely than comparable federal actions.

120. In this case, lands of the Delaware Tribe.

the state legislature passed an act purporting to extinguish the tax exemption. This Court struck down that act on the ground that it impaired protected contract rights of the Indians:

> Every requisite to the formation of a contract is found in the proceedings between the then colony of New Jersey and the Indians. The subject was a purchase on the part of the government of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A proposition to this effect is made, the terms stipulated, the consideration agreed upon, which is a tract of land, with the privilege of exemption from taxation; and then, in consideration of the arrangement previously made, one of which this act of assembly is stated to be, the Indians executed their deed of cession. This is certainly a contract, clothed in the forms of unusual solemnity. The privilege, though for the benefit of the Indians, is annexed, by the terms which create it, to the land itself, not to their persons.[121]

Thus, the decision in *New Jersey v. Wilson*, as the decision in *Choate v. Trapp*, is premised on the existence of a contractual relationship between the Indians and the government, and the execution of that contract by conveyance of land and an appurtenant tax immunity.[122]

121. 11 U.S. (7 Cranch) at 166-67. Chief Justice Marshall's analysis was based additionally on a holding that the tax immunity was annexed to the land itself.

122. The *Choate* Court at 672 also cited the cases *Wisconsin & Michigan Ry. v. Powers*, 191 U.S. 379 (1903), *Home of the Friendless v. Rouse*, 75 U.S. (8 Wall.) 430 (1869), and *Tomlinson v. Jessup*, 82 U.S. (15 Wall.) 454 (1872) in connection with its analysis of the Atoka Agreement. The above cases all deal with claims by corporations that tax immunities arising from a statutorily-established contractual relationship with the state were unconstitutionally divested by subsequent state legislation. These cases set out a legal framework for determining the existence of such a protected contractual relationship with a government. This framework, when applied to the facts of *Choate*, results in the finding of a contract between the Indians and the United States. *Choate* also cited at 672 *Keller v. Ashford*, 133 U.S. 610, (1890) and *Hendrick v. Lindsay*, 93 U.S. 143 (1876), in the course of its contractual analysis. *Keller* dealt with contractual obligations which may arise, in common law, from the acceptance of a deed. *Hendrick* dealt with contractual obligations which may arise, in common law, through negotiation for and acceptance of subsequently accruing benefits.

(5) This Court in *Choate* also significantly relied on *Jones v. Meehan*, 175 U.S. 1 (1899), which was said to exemplify the constitutional protection accorded to the private property rights of the individual Indians.[123] *Jones* clearly exemplifies the scope of that protection. A treaty with the Chippewas provided for the setting apart of a specific parcel of land for a Chippewa chief. This was held to be "a present grant of a complete title in fee simple; and that title is alienable by the grantee at his pleasure. . . ."[124] Title descended to the chief's son. The issue was whether Congress could subsequently interfere with the son's free exercise of his right, as fee simple owner, to lease the property. This Court's holding was well summarized in *Choate:*

> [T]he court held that the subsequent act could not relate back so as to interfere with the right of property which the Indian possessed and conveyed as an owner in fee, and while Congress had power to make treaties, it could not affect titles already granted by the treaty itself.[125]

(6) Finally, it should be observed that implicit in *Choate* is the recognition that the case purely involved a divestment of an Indian property right in favor of a non-Indian third party (the state). *Choate* did not involve a reallocation of Indian property between tribe and member.

123. 224 U.S. at 677.

124. 175 U.S. at 21.

125. 224 U.S. at 678. *See also Reichart v. Felps*, 73 U.S. (6 Wall.) 160 (1867), cited, but not discussed, in *Choate* for the proposition that Congress may not destroy private property rights. 224 U.S. at 671. *Reichart*, not a case involving Indians or Indian lands, dealt with lands which, pursuant to an act of Congress, were confirmed to individuals in fee by the delivery of patents. It was held that Congress could not, by subsequent legislation, nullify the previously-conveyed title.

Choate, then, stands for the following legal proposition: Congress may not, consistent with the Fifth Amendment, divest an allottee of a valuable attribute of his allotment for the benefit of a third party (such as a state) when that incident is provided for in a fully ratified contract between the Indians and the United States which has been executed through the actual making of allotments. That is, the *Choate* rule applies in the instance where: (1) there exists a valid contract between the Indians and the United States calling for the making of allotments having valuable attributes; (2) the contract is executed through the actual making of the allotments; and (3) Congress attempts subsequently to strip away, for the benefit of a non-Indian third party (such as the state), that valuable attribute of each executed allotment.

None of these three elements exist in the instant case: (1) the Northern Cheyenne Allotment Act of 1926 neither confirms, nor is otherwise based on, a contract between the United States and the Northern Cheyennes; (2) although allotments were made subsequent to the 1926 Act, the clear terms of both the Act and the allotment patents withheld minerals from allotment; and (3) the beneficiaries of the 1968 Amendment were the Northern Cheyenne tribal members as a whole.

The above analysis is thoroughly confirmed by examining the subsequent decisions of this Court and the lower federal courts.

d. *Decisions of This Court Subsequent to* Choate v. Trapp

That *Choate* did not absolutely preclude subsequent congressional elimination of the tax immunity involved in

Choate is demonstrated by two cases which followed *Choate*, *Sweet v. Schock*, 245 U.S. 192 (1917), and *Fink v. County Commissioners*, 248 U.S. 399 (1919). Both of these cases involved the Creek tax immunity which, under the reasoning of *Choate*, was held protected from congressional divestment in the case *English v. Richardson*, 224 U.S. 680 (1912), a companion to *Choate*.[126] *Sweet* and *Fink* dealt with the Act of May 27, 1908[127] involved in *Choate*, which eliminated restrictions on alienability of allotments and purported to remove the tax immunity of all newly-unrestricted allotments.[128] The allottees took advantage of the release of restrictions and conveyed their allotments; as a result, this Court was presented with the question of whether, under *Choate*, the tax immunity remained intact. The question was answered in the negative on the ground that Congress had the authority to enact—pursuant to a "new policy"[129] when "[a]ccomodation to new conditions became necessary"[130]—a statute which offered a new privilege (alienability) and exacted, in return, the release of a prior immunity (freedom from taxation).[131]

Furthermore, the decisions of this Court have expressly confirmed that *Choate* was founded on the existence of an *executed contract* between the Indians and the United States. *Gritts v. Fisher*, 224 U.S. 640 (1912),[132] decided on

126. *See* note 107, *supra*.

127. 35 Stat. 312.

128. *Sweet* involved, additionally, another similar act, the Act of April 26, 1906, 34 Stat. 137.

129. 248 U.S. at 404.

130. 245 U.S. at 195.

131. *See also Morrow v. United States*, 243 F. 854, 859 (8th Cir. 1917).

132. *Gritts* is discussed in detail at section 2, *supra*.

the same day as *Choate*, rejected a Fifth Amendment argument that a 1902 allotment act had created vested rights in allottees:

> The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when "it is only an act of Congress and can have no greater effect." . . . It was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued.[133]

See Sizemore v. Brady, 235 U.S. 441, 450 (1914), and *United States v. Jim*, 409 U.S. 80, 83 (1972), in which the identical language is applied to deny vested rights arguments.[134]

That the existence of a contract is fundamental to the *Choate* reasoning has been expressly recognized in *Brader v. James*, 246 U.S. 88 (1918), another case dealing with the limits of congressional power over allotments:

> The plaintiff in error relies upon *Choate v. Trapp*, 224 U.S. 665, in which this court sustained a contractual exemption as to taxation of certain Indian lands. In that case the right of exemption was based upon a valid and binding contract. . . .[135]

Recognition is contained as well in the following decisions of this Court, all dealing with allotment legislation: *Woodward v. DeGraffenried*, 238 U.S. 284, 315 (1915); *Sweet v. Schock*, 245 U.S. 192, 196 (1917); *Carpenter v. Shaw*, 280 U.S. 363, 366 (1930) (a case dealing with the tax immunity involved in *Choate*); and *Mahnomen County v.*

133. 224 U.S. at 648.

134. These cases are discussed at section 2, *supra*.

135. 246 U.S. at 97.

United States, 319 U.S. 474, 476 (majority opinion), 480 (dissenting opinion) (1943).

Moreover, it is noteworthy that the notion of contract has traditionally played a significant role in the public land decisions of this Court. This is, perhaps, best exemplified in decisions dealing with so-called "lieu" selections of public land. *Wyoming v. United States*, 255 U.S. 489, 497 (1921); *Payne v. New Mexico*, 255 U.S. 367, 369 (1921); *Payne v. Central Pac. Ry.*, 255 U.S. 228, 235 (1921). In each of these cases, a party, (either a state or a railroad), pursuant to federal statute, relinquished matured rights to selected public lands in return for a statutory promise of substitute or lieu lands. The lieu selections were enforced against the United States on the ground of contract:

> The provision under which the selection was made was one inviting and proposing an exchange of lands. By it Congress said in substance to the State: If you will waive or surrender your title tract in the reservation, you may select and take in lieu of it a tract of like area. . . . Acceptance of such a proposal and compliance with its terms confer a vested right in the selected land which the land officers cannot lawfully cancel or disregard.[136]

In addition, as the *Choate* analysis indicates, it is the *execution* of the allotment, pursuant to the contract, which ultimately vests rights. This is illuminated in *Sizemore v. Brady*, 235 U.S. 441 (1914):

> The land and funds to which [the agreement] related were tribal property and only as it was carried into effect were individual claims to be fastened upon them. Unless and until that was done Congress possessed plenary power to deal with them as tribal property.

136. *Payne v. New Mexico*, 255 U.S. 367, 370. *See also Burke v. Southern Pacific R.R.*, 234 U.S. 669, 679-80 (1914); *United States v. Southern Pacific R.R.*, 223 U.S. 565, 570 (1912).

> It could revoke the agreement and abandon the purpose to distribute them in severalty, or adopt another mode of distribution, or pursue any other course which to it seemed better for the Indians. . . . In short, the power of Congress was not exhausted or restrained by the adoption of the original agreement, but remained the same thereafter as before, save that rights created by carrying the agreement into effect could not be divested or impaired. *Choate v. Trapp*, 224 U.S. 665, 671.[137]

Accord, United States v. Rowell, 243 U.S. 464, 470 (1917). And, *see Levey v. Stockslager*, 129 U.S. 470 (1889).

This principle regarding the *execution* of allotment finds support in *Nadeau v. Union Pacfic R.R.*, 253 U.S. 442 (1920),[138] which upheld Congress' power to impose railroad rights-of-way on land which was to be allotted under a prior treaty:

> It seems plain that, at least, until actually allotted in severalty (1864) the lands were but part of the domain held by the Tribe. . . .
>
> The grant of the right-of-way in 1862 . . .took effect as of the date of the act. All who thereafter acquired public lands took subject to such granted right . . . . Although parties to the Treaty of 1861 contemplated future allotments, it made none. No individual title to any portion of the land arose until allotted, and none was allotted until after 1862.[139]

See United States v. Jackson, 280 U.S. 183, 191 (1930). Analogously, in *Mullen v. Pickens*, 250 U.S. 590 (1919), conveyances—prior to the issuance of allotment patents—of lands which were to be allotted under an agreement were struck down on the ground that "the lands prior to allotment were to remain communal, without private interest

137. 235 U.S. at 449-50.

138. *Nadeau* is discussed in detail at section 2, *supra*.

139. 253 U.S. at 445-46.

that was capable of descent or alienation."[140] *See Franklin v. Lynch*, 233 U.S. 269 (1914), where the interest of a prospective allottee prior to actual allotment was characterized as "a mere float or expectancy."[141]

e. *Decisions of Lower Federal Courts Subsequent to* Choate v. Trapp

A thorough survey of the decisions of lower federal courts applying *Choate* indicates that *Choate* has served primarily as a shield against state taxation of trust allotments. The typical fact pattern of such cases is as follows: a county or state endeavors to tax allotted lands, on the basis that a federal statute, enacted subsequent to the issuance of the allotment patent (generally issued pursuant to an agreement) has divested the allotment of its tax immunity. This is precisely the fact pattern in *Choate*. In each of these cases, the taxation is disallowed on the ground that, under *Choate*, Congress lacked Constitutional authority to divest the tax immunity.

The leading lower federal court case is *Morrow v. United*

140. 250 U.S. at 594.

141. 233 U.S. at 272. The above authorities do not conflict with the Mission Indian allotment litigation, consisting of *St. Marie v. United States*, 108 F.2d 876 (9th Cir. 1940), *cert. denied*, 311 U.S. 652 (1940); *Arenas v. United States*, 322 U.S. 419 (1944); *United States v. Arenas*, 158 F.2d 730 (9th Cir. 1946). These cases dealt simply with the extent to which the *Secretary of the Interior* had discretionary power, under the particular allotment act, to withhold final approval of allotment selections. The Ninth Circuit ultimately held that the Secretary lacked discretionary power, under the act, to deny approval because of his antagonism to the allotment policy. *See also United States v. Pierce*, 235 F.2d 885 (9th Cir. 1956). The distinct issue of the extent to which *Congress* possessed authority to enact legislation barring final approval of pending Mission Indian allotment selections was dealt with in *The Constitutional Power of Congress to Enact Legislation Concerning the Allotment of Lands to the Mission Indians of California*, 56 I.D. 102 (1937). In that decision, the Solicitor of the Department of the Interior held that Congress possessed such power. *See Clark, Jr. v. Benally*, 51 I.D. 91 (1925), *aff'd on rehearing* 51 I.D. 98 (1925).

States, 243 F. 854 (8th Cir. 1917), involving a Chippewa allotment issued pursuant to the Nelson Act,[142] and consummated by the issuance of a trust patent in 1902, under which the land was to be non-taxable for 25 years. In 1906, Congress enacted the Clapp Amendment,[143] which purported unilaterally to extinguish the tax immunity and provided for conversion of trust patents to fee simple patents. The court struck down this attempt to divest the immuity, on the following analysis:

> There is no question that the government may, in its dealings with the Indians, create property rights which, once vested, even it cannot alter. *Williams v. Johnson,* 239 U.S. 414, 420, 36 Sup.Ct. 150, 60 L.Ed. 358; *Sizemore v. Brady,* 235 U.S. 441, 449, 35 Sup.Ct. 135, 59 L.Ed. 308; *Choate v. Trapp,* 224 U.S. 665, 32 Sup.Ct. 565, 56 L.Ed. 941; *English v. Richardson,* 224 U.S. 680, 32 Sup.Ct. 571, 56 L.Ed. 949; *Jones v. Meehan,* 175 U.S. 1, 20 Sup.Ct. 1, 44 L.Ed. 49; *Chase v. United States,* 222 Fed. 593, 596, 138 C.C.A. 117. Such property rights may result from agreements between the government and the Indian. Whether the transaction takes the form of a treaty or a statute is immaterial; the important considerations are that there should be the essentials of a binding agreement between the government and the Indian and the resultant vesting of a property right in the Indian.
>
> That exemption of land from taxation is a property right is established. *Choate v. Trapp, supra.* That this Indian had taken possession of and was enjoying this land under such an exemption at the time the Clapp Amendment was passed is undisputed. Therefore, if this exemption came to him as a legal right, it had fully vested. It came as such legal right if it rested on the solid basis of a binding agreement.[144]

142. Act of January 14, 1889, 25 Stat. 642.

143. Act of June 21, 1906, 34 Stat. 353.

144. 243 Fed. at 856.

The Court then went on to detail the negotiations between the United States and the Indians which resulted in the relinquishment by the Indians of recognized claims to vast lands in return for allotments and distribution of other tribal assets. The Court continued:

> The commissioners provided for in the act secured the written consent of the required number of Indians only after almost six months of patient negotiations. The cession was later ratified by the President and thereupon became effective, the Indians removed to the two reservations, relinquished the balance of their lands, and received allotments in severalty.
>
> Thus the terms of this act, as well as its attendant circumstances, leave no doubt that this act required, before it should become effective, an agreement to its terms by the Indians and the cession by them of very valuable tracts of land to which their title was unimpeached. The Indians fully performed their part of the agreement, and it was in exact performance upon its side that the government allotted to this Indian his land and was holding it for him at the time the Clapp Amendment was enacted. Such a proposal, acceptance, passage of consideration, and performance between private parties would constitute a valid contract. The character of this transaction is not changed because one of the parties to it is the government.[145]

This analysis was followed completely in *United States v. Spaeth,* 24 F.Supp. 465, 466-67 (D. Minn. 1938).

In the Ninth Circuit, substantially similar fact patterns have given rise to identical analyses. *United States v. Benewah County, Idaho,* 290 F. 628 (9th Cir. 1923); *United States v. Nez Perce County, Idaho,* 95 F.2d 232 (9th Cir. 1938); *Glacier County, Mont. v. United States,* 99 F.2d 733 (9th Cir. 1938); *United States v. Ferry County, Wash.,*

145. 243 F. at 857.

24 F.Supp. 399 (E.D. Wash. 1938); *United States v. Ferry County*, 39 F.Supp. 1007 (E.D. Wash. 1941).

In *Benewah*, a patent for a tax-exempt allotment had been issued, subsequent to treaties under which the Indians ceded extensive lands. Thereafter, the Secretary unilaterally issued a patent in fee and the county commenced assessing taxes. The reasoning of the court, adhered to in each of the subsequent Ninth Circuit decisions,[146] was as follows:

> The Indians were guaranteed nontaxable land for the period of 25 years after the issuance of the trust patents. In *Choate v. Trapp* the Court gave consideration to the fact that the Indians were offered the allotments on the conditions proposed, and that by accepting the terms and relinquishing their claims they furnished a consideration which was sufficient to entitle them to enforce whatever rights were conferred. One of those rights was exemption from taxation. . . .
>
> So in the present case the right of the Indians to have their allotments held in trust by the United States free from taxation by local authorities for a period of 25 years was a valuable right. Once vested as it was, it could only be divested by due process of law.[147]

Finally, Tenth Circuit cases are to the same effect. Tax immunities incident to fully consumated allotments are protected, on reasoning such as the following:

> That Cherokee homesteads acquired under the Allotment Act of July 1, 1902, are non-taxable as long as they are held by the allottees seems to have been settled by the decisions in *Choate v. Trapp* . . . and the two cases that immediately follow it. . . . The relations between the Five Civilized Tribes and the

146. *United States v. Nez Perce County, Idaho*, 95 F.2d 232, 235-36; *Glacier County, Mont. v. United States*, 99 F.2d 733, 734-35; *United States v. Ferry County, Wash.*, 24 F.Supp. 399, 400-01; *United States v. Ferry County*, 39 F.Supp. 1007, 1010-12.

147. 290 F. at 631.

> United States in the division of tribal lands between the members of the tribes in severalty was contractual. The Cherokees were given the privilege of determining by vote of its members whether it would accept the proposals. They did accept. . . . It was therefore held [in *Choate*] that the acceptance of deeds containing exemption of the land from taxation under the allotment acts operated as full performance by the allottees of the contract and created a vested right in the Indian of the exemption which is protected by the Fifth Amendment.

Board of Comm'rs of Tulsa County, Okla. v. United States, 94 F.2d 450, 451 (10th Cir. 1938). *Accord, Bryan County, Okla. v. United States*, 123 F.2d 782, 784 (10th Cir. 1941); *Landman v. Commissioner of Internal Revenue*, 123 F.2d 787, 789-90 (10th Cir. 1941); *United States v. Board of Comm'rs of Comanche County, Okla.*, 6 F.Supp. 401, 402-03 (W.D. Okla. 1934).

4. The Circumstances Surrounding the 1926 Act and the Legislative History of the Act Clearly Support the Act's Meaning—Namely, That All Reservation Minerals Be Withheld From Allotment, Retained in Tribal Ownership, and Made Subject To Continuing Congressional Control.

While the plain language of the 1926 Act of and by itself conveys the Act's intent, lest there be any question, attention is herein directed to the circumstances surrounding the Act and the Act's legislative history.[148] As this Court has

148. The legislative history of a statute may be judicially noticed. *Territory of Alaska v. American Can Co.*, 358 U.S. 224 (1959). The court may consider reports of congressional committees, comparisons of successive drafts or amendments to the measure, and congressional debates. *Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke*, 300 U.S. 440 (1937). In addition, the court may consider the historical setting from which the statute arose to determine congressional intent. *The Delaware*, 161 U.S. 459, 474 (1896); *Platt v. Union Pacific R.R.*, 99 U.S. 48, 67 (1878).

pointed out, in seeking congressional intent when Indian legislation is involved, consideration should be given to "the circumstances in which the reservation was created—the power of Congress in the premises, the location and character of the [Indian lands], the situation and needs of the Indians and the object to be attained." *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 87 (1918). Hence, it is appropriate if not necessary to examine the general history and condition of the Northern Cheyennes; the relationship between the Tribe and Congress from the time of the Reservation's establishment until the early 1920s; the interaction between the Tribe and Congress from the early 1920s until the 1926 passage of the allotment act; and, finally, attention will be devoted to the full legislative history of the 1926 Act.

a. *History and Condition of the Northern Cheyennes*

The Northern Cheyenne Tribe was the last American Indian tribe to receive allotment. Allotments were not actually made on the Reservation until 1932, two years before Congress terminated the allotment system.[149] Congress' reluctance to bestow the "civilizing" [150] benefits of allotment on the Northern Cheyennes arose from the unique history and character of this people.

The Northern Cheyenne—a remarkably proud, courageous and skilled tribe of warriors—fiercely resisted the white man's march into the Great Plains. The Northern Cheyenne, with the Sioux, defeated Custer at Little Bighorn in 1876 and responded to their subsequent banish-

149. Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§ 461-62 (1970).

150. *See* W. WASHBURN, THE ASSAULT ON INDIAN TRIBALISM: THE GENERAL ALLOTMENT LAW (DAWES ACT) OF 1887 28-31 (1975).

ment to Oklahoma with a defiant trek back to Montana in 1878 to reclaim their homeland which is now the Reservation. Indeed, it is believed that no other tribe, with the possible exception of the Sioux, played a greater part in resisting the settlement of the Plains.[151]

Unlike most tribes, the Northern Cheyenne were not placed on a reservation until 1884. An Executive Order established a reservation of 371,200 acres[152] (immediately to the east of the 3,504,000-acre reservation of the traditional enemy of the Northern Cheyenne, the Crow—who had served as Custer's scouts at Little Bighorn).

Throughout the next fourteen years, Congress took no legislative action whatsoever with respect to the Northern Cheyennes. In 1898, to alleviate friction and bloodshed between the Northern Cheyenne and whites on the Reservation, Congress directed that an inspector be sent to the Reservation to determine the feasibility of transferring the Northern Cheyennes to the Crow Reservation.[153] James McLaughlin—a man with unique and vast experience in the Indian Service [154]—was appointed by the Secretary of the Interior to conduct this inspection. The following year, 1899, McLaughlin reported his findings.[155] He reported that the Northern Cheyennes were "among the least civilized of the Indian Tribes," and were regarded by the Crows

151. R. ANDRIST, THE LONG DEATH—THE LAST DAYS OF THE PLAINS INDIANS 70 (1964); DEP'T OF THE INTERIOR, ANNUAL REPORT FOR 1920, vol. II, REPORT OF THE BOARD OF INDIAN COMMISSIONERS 30-31 (1920).

152. I C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 860 (1904) (pages A-7-8, *infra*).

153. Act of July 1, 1898, 30 Stat. 571, 596.

154. *See* J. MCLAUGHLIN, MY FRIEND THE INDIAN (1963 ed.).

155. H.R. REP. No. 153, 55th Cong., 3d Sess. (1899).

as "uncivilized and aggressive."[156] McLaughlin concluded that the removal of the Northern Cheyennes to the Crow Reservation was not feasible. He endorsed, instead, the buying-out of the white interests on the Reservation and the enlargement of the Reservation. These recommendations were adopted.[157]

Congressional activity with respect to the Tribe from 1903 until the 1926 allotment act was but nominal and limited.[158] While other reservations in Montana and throughout the country were the objects of individualized allotment acts and other tailored legislation, Congress neglected the Northern Cheyenne.

This congressional neglect was documented in the course

156. *Id.* at 5. In his memoirs, McLaughlin noted that he found the Northern Cheyennes to be exceptionally proud and accomplished warriors, whose "advance in the arts of civilization was handicapped by their warlike attributes . . . and they were not curbed for many years after the other warlike tribes had accepted the conditions imposed by the whiteman." J. McLaughlin, My Friend the Indian 81 (1963 ed.).

157. Executive Order of March 19, 1900 (pages A-8-9, *infra*); Act of March 3, 1903, 32 Stat. 982, 1000.

158. This congressional activity consisted exclusively of occasional one or two sentence provisions within yearly Indian appropriations acts. Act of June 21, 1906, 34 Stat. 325, 354 (for purchase of livestock); Act of March 1, 1907, 34 Stat. 1015, 1035 (for irrigation system); Act of April 4, 1910, 36 Stat. 269, 277 (for industry and farming); Act of June 30, 1913, 38 Stat. 77, 90 (for tribal funds to be used for purchase of cattle and other articles); Act of August 1, 1914, 38 Stat. 582, 593 (for subsistence, civilization and purchase of cattle); Act of June 30, 1919, 41 Stat. 3, 16 (travel funds for support and civilization, funds for irrigation district); Act of February 14, 1920, 41 Stat. 408, 421 (tribal funds for support and civilization, funds for irrigation); Act of March 3, 1921, 41 Stat. 1225, 1226, 1237 (tribal funds for support and civilization, funds for irrigation); Act of May 24, 1922, 42 Stat. 552, 560, 571 (funds for irrigation); Act of January 24, 1923, 42 Stat. 1174, 1181, 1192 (tribal funds for support and civilization, funds for irrigation); Act of June 5, 1924, 43 Stat. 390, 400, 411 (funds for irrigation); Act of March 3, 1925, 43 Stat. 1141, 1151, 1160 (tribal funds for support and civilization, funds for irrigation); Act of May 10, 1926, 44 Stat. 453, 473 (tribal funds for support and civilization).

of the *Senate Survey of Conditions of the Indians in the United States,*[159] a survey which reexamined government Indian policies.[160] In September of 1928 the Senate sent Special Investigator Walter W. Liggett to the Montana reservations, including the Northern Cheyenne, to study and report on conditions.[161] As to the Northern Cheyennes, Liggett reported:

> The Northern Cheyenne Indians probably are the most primitive among the tribes in the northern part of the United States. With the Sioux, their allies, they were the last Indians to become "pacified" after the Custer battle in 1876. The reservation is isolated, and the fact that it has not been allotted has kept whites away. Consequently these Indians are probably more backward and closer to savagery than any other Montana Indians. *They* are not well organized and *have not importuned Congressmen or Senators for special favors.* As a result they seem to have been neglected by the Indian Bureau, and the sanitary and economic conditions existing on the Tongue River [*i.e.*, Northern Cheyenne] Reservation is a damning indictment of bureaucratic indifference. This reservation is literally a plague spot, and the entire Northern Cheyenne Tribe is rotten with disease. The actual conditions repeatedly have been called to the attention of responsible Indian Bureau officials at Washington, D.C. No attempt whatever has been made to ameliorate the perfectly appalling health situation. In fact, the Indian Bureau refused to finance a Red Cross unit which was established on the reservation and discontinued the services of a single field matron who was doing splendid work. The inevitable result is that the health

159. This survey was initiated by Sen. Res. 79, 70th Cong., 1st Sess. (1928).

160. And, *see generally* W. Hagan, American Indians 152-53 (1961)

161. *See Hearings on Indian Affairs Before a Subcomm. of the Senate Comm. on Indian Affairs,* 72d Cong., 1st Sess., pt. 23, "Montana" at 12435 (Fort Peck); 12520 (Rocky Boy); 12597 (Fort Belknap); 12746 (Blackfeet); 12841 (Northern Cheyenne); 12939 (Crow) (1929).

situation on the Tongue River Reservation is steadily growing worse and now has reached a stage so unbelievably bad that it constitutes a black blot on the American flag. We have established sanitary zones in the Philippines and the Caribbean, but the Cheyenne Indians are allowed to slowly perish amid almost indescribable dirt, disease, and general degradation. It is almost incredible that responsible officials of any civilized government should permit such disgraceful conditions in this day and age. That such conditions do exist on the Tongue River Reservation reveals the characteristic callousness of the Indian Bureau—or else its total lack of imagination—in dealing with the human factors of health and happiness of its helpless wards. It is very difficult to discuss the situation on Tongue River Reservation in moderate language, but the following facts seem to justify any superlatives that may be called forth by honest indignation. [emphasis added][162]

The Northern Cheyennes' reticence to seek congressional favors, as noted by Liggett, is of vital importance to this case. Indeed, this reticence is attested to by the total lack of significant congressional action with respect to the Northern Cheyenne during the first quarter of the twentieth century. This history of reluctance to pursue congressional favors points up the immense significance of a singular event which occurred on the Reservation in early

162. *Id.* at 12841-42. While Special Inspector Liggett's language is unquestionably harsh, it is in fact credible. The texts of Liggett's reports on other reservations (note 161 *supra*) make it clear that he was an objective observer of reservation life, not prone to hyperbole. Beyond being an objective observer, Liggett was also quite astute. As early as 1928 he had observed: "The entire Tongue River [*i.e.*, Northern Cheyenne] Reservation is underlaid with a thick vein of coal. There are frequent outcroppings. This coal seems to be a cross between lignite and bituminous coal and is of fairly high quality. . . . The coal on the Tongue River Reservation cannot be developed commercially at this time, owing to lack of rail facilities. There is no doubt, however, that some time the coal will prove a valuable asset." *Id.* at 12848. In addition, *see* DEP'T OF THE INTERIOR, ANNUAL REPORT FOR 1920, vol. II, REPORT OF THE BOARD OF INDIAN COMMISSIONERS 30 (1920).

1925, an event of unique importance to the proper construction of the 1926 allotment act—a tribal petition to Congress.

b. *The 1925 Northern Cheyenne Petition To Congress*

By 1924, the Northern Cheyenne people were painfully aware that they had not yet received an allotment act. Aside from the Rocky Boy Reservation, which was never to be allotted, all other Indian reservations in the State of Montana had received allotment acts.[163] Thus, the Tribe began a course of correspondence and discussion with members of the Montana congressional delegation in hopes of procuring an act of allotment.

In October of 1924, a tribal committee met with Senator Thomas J. Walsh of Montana to advise him of the Tribe's desire for allotment.[164] The following month, a tribal representative wrote to the Senator:

> I believe this is one of the last reservations that is unallotted, therefore, I have taken this matter up with various people, in fact, we have talked about it for the last four or five years, and we have finally come to the conclusion to ask you to help us.
>
> . . . .
>
> It is high time that something is done for the Northern Cheyenne Indians. We want to be abreast of times. . . .[165]

In early December, 1924, Walsh urged the Commissioner of Indian Affairs, Charles H. Burke, to draft a Northern Cheyenne allotment bill for introduction in Congress.[166]

163. *See* section 4d, *infra*.

164. Appendix at A-49.

165. Appendix at A-47-48.

166. Appendix at A-49.

Commissioner Burke responded that such allotment was not advisable, because the land was not suitable for farming.[167] Shortly thereafter, Senator Walsh transmitted the Commissioner's refusal to the Tribe and solicited the Tribe's help in overcoming the Commissioner's opposition:

> I wish, accordingly, that you would arm me with whatever information you can gather in opposition to the views expressed by the Commissioner in his letter. It might be that thus armed, I could change the views of the Commissioner, or failing in that, prevail upon the Secretary to give his support to the allotment plan.[168]

This request brought forth an overwhelming and unprecedented response from the proud and typically reticent Northern Cheyennes—namely, a tribal petition to Congress, an emphatic declaration of tribal hopes and expectations. Introducing this petition was a letter of February 3, 1925, signed by tribal chiefs and headsmen. Sent to Senator Walsh, the introductory letter began:

> We transmit herewith a petition signed by all of the people belonging to this reservation that we were able to see in the short time allowed. In fact we encountered no opposition whatever, and they were all in hearty accord with the allotment idea. Also, we thought it advisable to get you the following data and reasons for allotment so as to arm you for argument with the Indian Office. We can assure you in

167. Commissioner Burke wrote to Senator Walsh: "The reservation is generally rough and ninety-five per cent of the land is unsuitable for agricultural purposes, being of value only when used in connection with livestock and grazing industries. The range can be used to much greater advantage by holding it, at least for present, as tribal property. . . ." Appendix at A-50. Members of the Board of Indian Commissioners held similar views. DEP'T OF THE INTERIOR, ANNUAL REPORT FOR 1919, vol. II, REPORT OF THE BOARD OF INDIAN COMMISSIONERS 252-56 (1920); DEP'T OF THE INTERIOR, ANNUAL REPORT FOR 1920, vol. II, REPORT OF THE BOARD OF INDIAN COMMISSIONERS 31 (1920).

168. Appendix at A-52.

> advance that all data contained in our letter is authentic.[169]

The entire tribal petition reads:

> We, the undersigned members of the Northern Cheyenne Indian Tribe of the State of Montana, do hereby humbly beseech you to do all in your power to have a bill introduced and passed in Congress, to have an allotment of not less than 320 acres of tillable farm land made to each and every member of the Northern Cheyenne Indians.
>
> *To reserve all mineral, timber, and coal lands for the benefit of the Northern Cheyenne Indian Tribe, said tribe to have absolute control of same.*
>
> As our Reservation is rather small, and we understand that the old Fort Keough Military Reservation has been abandoned for military purposes, we ask you to try and have it turned over to the Northern Cheyenne Indians so that we may have enough land to give each member of the tribe the above asked for 320 acres. [emphasis added][170]

Attached to this petition were 37 pages bearing the signatures, marks, and thumbprints of approximately 490 men and women of the Tribe.[171] In view of this petition, there can be no doubt that the Northern Cheyenne people de-

169. Appendix at A-53.

170. Appendix at A-56.

171. Appendix at 57-93. This constituted a majority of the adult members of the Tribe. In 1925, there were approximately 1,408 Northern Cheyennes on the Reservation. H.R. REP. No. 383, 69th Cong., 1st Sess. 1 (1926). From statistics for prior years (DEP'T OF THE INTERIOR, ANNUAL REPORT FOR 1906 263 (1907)) and subsequent years (NAT'L ARCHIVES, INSPECTION REPORT—NORTHERN CHEYENNE INDIAN RESERVATION, Record Group No. 75, Box 148, Folder 150, at 1), it can be reliably determined that adult members constituted between 52 and 60 per cent of the total tribal population. Applying the higher percentage to the 1925 population yields 845 adult Northern Cheyennes in 1925. Thus, as a conservative figure, approximately 58 per cent of the adult members of the tribe signed the 1925 petition to Congress.

sired that the ownership and control of all Reservation minerals be retained by the Tribe.[172]

As the complete texts of the letter[173] and the petition amply demonstrate, the Northern Cheyennes viewed allotment as a means of procuring a plot of surface for home-building, farming, and grazing. That this remained their sole and exclusive interest throughout was demonstrated beyond question in their statements to Special Investigator Liggett in 1928 and their testimony to a subcommittee of the Senate Committee on Indian Affairs in 1929.[174] Furthermore, this view did not change when actual allotting commenced in 1932. The language of the trust patent unequivocally reserves the minerals on the Reservation to the Tribe—indeed, without even mentioning, let alone conveying, an allottee's future interest in the minerals.[175]

c. *Formulation and Passage of the 1926 Northern Cheyenne Allotment Act*

Early in 1926, Congress,[176] the Department of the In-

172. Moreover, the tribal petition to Congress possessed ongoing significance to the Northern Cheyenne people. For example, a 1928 statement from tribal member John Blackwolf to Special Investigator Liggett asserted: "Before the Reservation was surveyed, and before the bill was passed, *we made a petition and signed it* to get 320 acres for each person." *Hearings on Indian Affairs Before a Subcomm. of the Senate Comm. on Indian Affairs*, 72d Cong., 1st Sess., pt. 23, at 12855 (1929) [emphasis added].

173. Appendix, at A-53-55.

174. Numerous tribal leaders and members presented testimony and recorded statements which indicated the entire range of their interests and concerns regarding Reservation land use. From the testimony and statements it could not be clearer that their goals related only to farming, grazing, and home-building. *Hearings on Indian Affairs Before a Subcomm. of the Senate Comm. on Indian Affairs*, 72d Cong., 1st Sess., pt. 23, at 12779-871 (1929).

175. Appendix at A-45-46. And, *see* District Court Opinion, at note 28 (Petition for Certiorari at A-26).

176. Representative Scott Leavitt of Montana was the House sponsor

terior, and Northern Cheyenne representatives[177] began formulating an allotment bill for the Northern Cheyenne; on June 3, 1926, an allotment act for the Tribe was passed. From a careful study of the surrounding legislative process, it becomes apparent that all parties had proceeded throughout with the intent that the allotment act should serve two limited, specific functions: limited surface estates should be allotted to enable the development of individual homesteads; and, all remaining lands and natural resources—particularly minerals—should be withheld from allotment and confirmed and preserved in tribal ownership for the collective use and benefit of the Tribe. It must be conceded that the legislative record contains no evidence expressly explaining the origin of the provision to transfer minerals 50 years hence. However, taken as a whole and taken in light of the clear purposes of the Act, the record indicates that the setting of a date, 50 years hence, for the transfer of the minerals was nothing more than an administrative detail—a detail ancillary to the primary congressional purpose of withholding Reservation minerals from allotment so that these minerals could be developed for the use and benefit of *all* members of the Tribe.

On February 17, 1926, Secretary of the Interior Hubert Work sent a letter to the Chairman of the House Committee on Indian Affairs, Representative Scott Leavitt of

of the 1926 Act; Senator Thomas J. Walsh of Montana was the Senate Sponsor. 67 CONG. REC. 5449, 6312, 9735-36, 9848, 9885-86, 9901 (1926).

177. John Stands In Timber and Eugene Fisher were in Washington, D.C. during this period as representatives of the Tribe with respect to the allotment bill. 67 CONG. REC. 5449, 6312, 9735, 9886 (1926). Mr. Stands In Timber, especially, was a respected member of the Tribe and spokesman for the Northern Cheyenne people. M. LIBERTY & J. STANDS IN TIMBER, CHEYENNE MEMORIES 3-10 (1967).

Montana, proposing and recommending a Northern Cheyenne allotment act. Secretary Work stated:

> Up to the present none of the lands there have been allotted in severalty for the reason that it has been thought best to keep the entire reservation in tribal status for general grazing purposes. It is now believed that a part of the agricultural lands may be advantageously allotted. . . .
>
> The proposed bill also provides. . . for a report by the Geological Survey, covering the lands that may be listed for allotment, as to coal and other mineral deposits. . . .In the event any of the land listed for allotting is found to contain coal or other minerals, it is contemplated to reserve all such minerals for the Tribe and to allot the surface only.[178]

Secretary Work's proposed bill limited each allotment to 80 acres of agricultural land:

> The Secretary of the Interior shall also cause to be prepared. . . a list of the lands of said Indian reservation. . .which may be used advantageously for agricultural purposes . . .and after the approval of said list of agricultural lands, the Secretary of the Interior is hereby authorized to make allotments in severalty to the duly enrolled Indians in areas not exceeding eighty acres to any individual, from the lands appearing on said approved list. . . .[179]

However, the proposed bill stipulated that prior to actually allotting these listed agricultural lands, the Geological Survey was to examine them for minerals. If coal or other minerals were found on these listed lands, only their surface was to be allotted; the lands' minerals were to remain in tribal ownership for fifty years and *then* be allotted:

> That prior to making the allotments as authorized herein, the Secretary of the Interior shall cause an examination to be made by representatives of the Geological Survey of all lands included on said approved list . . .for the purpose of determining the mineral character thereof. . .and if any of the land shall be found to contain coal or other minerals, only the surface thereof may be allotted, and all minerals on said lands are hereby reserved for the benefit of the tribe: *Provided,* That at the expiration of fifty years . . .the coal or other mineral deposits of said allotments shall become the property of the respective allottees or their heirs or assigns.[180]

178. H.R. REP. No. 383, 69th Cong., 1st Sess. 1-2 (1926) (page A-13, *infra*).

179. H.R. 9558, 69th Cong., 1st Sess. (1926) (page A-10, *infra*).

On February 19, 1926, the above bill was introduced in the House of Representatives; an identical bill was introduced in the Senate on February 24, 1926.[181]

Report of the House Committee and House Passage of an Amended Bill

The House Committee on Indian Affairs promptly reported on the Northern Cheyenne bill and recommended its passage—with one significant amendment.[182] The Committee recommended that the provision covering allotment of surface and reservation of minerals be more broadly worded:

> That only the surface of any lands in this reservation may be allotted, and all minerals on said lands are hereby reserved for the benefit of the tribe; *Provided further,* That at the expiration of fifty years from the date of approval of this Act, the coal or other mineral deposits of said allotments shall become the property of the respective allottees or their heirs or assigns.

The bill, with the above Committee amendment, was reported out to the House on February 25, 1926.[183] The

180. *Id.* (at A-11, *infra*).

181. S. 3261, 69th Cong., 1st Sess. (1926).

182. H.R. REP. No. 383, 69th Cong., 1st Sess. (1926), (pages A-12-13, *infra*).

183. *Id.* (at A-12, *infra*).

next month, on March 29, 1926, the bill, as amended, was passed by the House.[184]

Report of the Senate Committee and Senate Passage of a Further Amended Bill

Three weeks later, the Senate Committee on Indian Affairs reported out the bill and recommended its passage, with the following four significant amendments:[185] (1) an opening section was added which explicitly confirmed tribal title to the entire Reservation and specifically stated Congress' continuing control over the tribal lands:

> That the Northern Cheyenne Indian Reservation heretofore set apart by Executive order dated the 19th day of March, 1900, for the permanent use and occupation of the Northern Cheyenne Indians, in Montana, be, and the same is hereby, declared to be the property of said Indians, subject to such control and management of said property as the Congress of the United States may direct.

(2) The allotment tracts were increased from 80 acres of agricultural land to 160 acres of agricultural, grazing, and timber land. (3) The requirement that the Geological Survey make an examination for minerals was deleted. Instead, the provision withholding "minerals" from allotment was broadened to encompass "coal or other minerals, including oil, gas, and other natural deposits," followed by a provision specifically declaring Congress' continuing control over all lands withheld from allotment:

> That the timber, coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved for the benefit of the tribe: *Provided,* That at the expiration of fifty years from the

184. 67 Cong. Rec. 6312 (1926).

185. S. Rep. No. 638, 69th Cong., 1st Sess. (1926) (pages A-14-17, *infra*).

> date of the approval of this Act the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall become the property of the respective allottees or their heirs: *Provided further,* That the unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians.

(4) A provision was added calling for the per capita distribution of all income derived from the unallotted minerals and timber.

On the floor, the Senate bill was further amended—the tribal council was granted power to lease the reserved minerals and natural deposits. Under the sponsorship of Senator Walsh of Montana, this amended bill was then initially passed by the Senate on May 20, 1926.[186] In addition, before final passage, one other relevant amendment was made—the provision calling for per capita distribution of income from minerals was changed to provide that all such income be held for the benefit of the Tribe as a whole.[187]

Passage of the Final Bill

The Northern Cheyenne allotment bill, so amended, was passed by the House[188] and the Senate.[189] Upon passage in the House, Representative Leavitt, the bill's sponsor, made the following remarks:

> During the summer of 1925 and the previous year, I met delegations of Indians from the Tongue River [*i.e.*, Northern Cheyenne] Reservation to discuss the problems confronting them and I became convinced

186. 67 Cong. Rec. 9735-36 (1926).

187. 67 Cong. Rec. 9885-86 (1926).

188. *Id.*

189. 67 Cong. Rec. 9901 (1926).

that one of the things required was to allot land to the members of the tribe so that they would be able to have permanent homes and develop their own farms and livestock acitivities.

. . .The bill as I introduced it was discussed here in Washington with members of the Tribe who came here for that purpose. . . .Senator WALSH has also given a good deal of consideration to the measure. . . . The Senator from Montana and the Senator from Wyoming have been in conference with representatives of the Indians, as I have been continually myself.

This is a very important bill to the Indians, because it not only provides an allotment of 160 acres to each member of the tribe but it also preserves the tribal grazing and timberlands for the benefit of the entire tribe, and *offers a means for the development of any mineral resources, such as oil, which may be discovered on the reservation, for the benefit of the tribe.* In other words, it finally and fully confirms the title of these reservation lands to the individual Indians and to the tribe in such a way as to develop their homes and *to give the Indians the fullest possible benefit of their natural resources.* [emphasis added][190]

The result, then, was a very limited allotment act, calculated to meet two basic goals: (1) the allotment of 160 acres of surface to permit the development of individual homesteads; and (2) the confirmation and preservation of tribal title to all other lands and natural resources on the Reservation for tribal benefit—with this benefit for all tribal members being expected to flow, in particular, from the tribal development of Reservation minerals. The setting of a date, 50 years hence, for the future allotment of the minerals was nothing more than an administrative detail, ancillary and subservient to the fundamental congressional purpose of withholding all minerals from allotment so that

190. 67 Cong. Rec. 9886 (1926).

they might ultimately be developed for the benefit of the Tribe as a whole. To interpret this administrative detail as a bar against further congressional action designed to realize tribal mineral development would be a clear violation of the central intent of Congress in 1926.

d. *Federal Policy Contemporaneous With the Passage of the 1926 Act*

The intent of the 1926 Congress should be determined in light of then prevailing federal policies respecting both the Northern Cheyenne Tribe and the general concept of allotment. The federal attitude toward the Northern Cheyenne Tribe has already been described in detail (subsections a and b, *supra*). In short, responsible officials had long considered the Northern Cheyenne the most primitive of Indian tribes, singularly ineligible for allotment's "benefits." Thus, while by 1908 all other Montana tribes (except the Rocky Boy, which was never to be allotted) had received initial allotment acts—the Fort Belknap in 1888,[191] the Flathead in 1904,[192] the Crow in 1904,[193] the Blackfeet in 1907,[194] and the Fort Peck in 1908[195]—the Northern Cheyenne stood unallotted through the mid-1920s. Finally, however, in 1926 Secretary of the Interior, Hubert Work, begrudgingly recommended allotment for the Northern Cheyenne, but only after the Northern Cheyenne themselves had submitted their unprecedented 1925 tribal petition seeking surface land allotments.

However, by the time of the 1925 tribal petition, the

191. Act of May 1, 1888, 25 Stat. 113.
192. Act of April 23, 1904, 33 Stat. 302.
193. Act of April 27, 1904, 33 Stat. 352.
194. Act of March 1, 1907, 34 Stat. 1015, 1035.
195. Act of May 30, 1908, 35 Stat. 558.

allotment policy, which had dominated federal Indian policy since 1887,[196] was a clear failure and in the throes of critical reexamination:

> Friends of the Indian who were willing to face the facts must have been at their wit's end by 1925. Policies undertaken in the nineteenth century with sublime assurance of their ultimate success no longer appeared efficacious, even with good administration. The Indian death rate was exceeding the birth rate, and their economic position was clearly worsening. When tribal identity became blurred, one of the great objectives of the reformers was accomplished. But the stubborn Indians stoutly refused to become white men.[197]

> By all accounts, the allotment policy was a disaster. Destruction of the land base had the immediate effect of reducing tribal control of internal affairs to almost a nullity. Further, although the Indian culture was widely diverse from tribe to tribe, nowhere did that culture contain anything to prepare the individual Indian to become a farmer or to assume the incidents of private ownership. [footnotes omitted][198]

In fact, as early as 1922, the Indian-reform movement was pressuring for the abolishment of the allotment policy.[199]

It was in these circumstances in 1923 that Hubert Work was appointed Secretary of the Interior. He immediately ordered the commencement of a series of in-depth reassessments of federal Indian policy:

> When Hubert Work became Secretary of the Interior it was apparent to him that the only way to avoid

196. Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. §§ 331 *et seq.* (1970).

197. W. HAGAN, AMERICAN INDIANS 150 (1961).

198. Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 959-60 (1972).

199. S TYLER, A HISTORY OF INDIAN POLICY 112 (1973).

> the continued needling of the reformers was to officially examine the Indian Service and recommend whatever changes seemed to be necessary.
>
> The first report to appear at his request was that of the Committee of One Hundred, a national advisory committee on Indian affairs. Completed in December of 1923, it appeared the next year as a congressional document bearing the title "The Indian Problem".
>
> . . . .
>
> The report of the Committee of One Hundred did not satisfy the reformers. . . . Still under public pressure and still feeling the need for further survey of the Bureau, Secretary Work called upon the Board of Indian Commissioners to investigate the Bureau and make recommendations to him. Their report was submitted January 26, 1926 . . . [T]hey recommended that a "non-governmental, disinterested organization, with a field force of experts" be engaged to make a study. . . .
>
> On June 12, 1926, Secretary Work officially requested W. F. Willoughby as Director of the Institute for Government Research to make the survey, which was . . . submitted to the Secretary of the Interior, February 21, 1928. Published and widely disseminated as a study of *The Problem of Indian Administration*, it accomplished what the Board of Indian Commissioners had predicted it would, and both the Congress and the general public were impressed.[200]

The Institute for Government Research survey (the "Meriam Report") sharply attacked the allotment policy.[201] This monumental study galvanized the Senate into action. In early 1928 the Senate began an unprecedented, exhaustive investigation into conditions on Indian reserva-

200. *Id.* at 113-14.

201. DEPT OF THE INTERIOR, THE PROBLEM OF INDIAN ADMINISTRATION 7-8 (1928).

tions,[202] which led shortly thereafter to the official termination of the allotment policy.[203]

Accordingly, in February 1926 when Secretary Work shaped and submitted to Congress a proposed Northern Cheyenne allotment act, the federal allotment policy was already in public disrepute and was the object of substantial official criticism and reassessment. The 1926 Act, then, was principally a product of three major pressures, all serving to produce a distinctly narrow allotment act: (1) the entrenched view of Federal officials that the Northern Cheyenne were simply not suitable for allotment; (2) the tribal view as expressed by the 1925 tribal petition which made but a narrow request for the allotment of surface lands only; and, (3) the increasingly widespread view—in both official anad unofficial circles—that the allotment policy had generally proven itself a failure.

The singularly *limited* nature of the 1926 Act is best revealed by comparing it to relevant prior allotment acts covering other reservations, particularly Montana reservations. The following allotment acts have been carefully reviewed: the Blackfeet Allotment Act of 1907, as amended;[204] the Fort Peck Allotment Act of 1908;[205] the Crow Allotment Act of 1920;[206] the Fort Belknap Allotment Act of

202. *See, Hearings on Survey of Conditions of the Indians in the United States Before the Senate Comm. on Indian Affairs*, 70th Cong.–78th Cong., (1928-43); W. HAGAN, AMERICAN INDIANS 153 (1961); S. TYLER, A HISTORY OF INDIAN POLICY 114-15 (1973).

203. THE INDIAN IN AMERICA'S PAST 117-18 (J. Forbes ed. 1964).

204. Act of March 1, 1907, 34 Stat. 1015, 1035; Act of June 30, 1919, 41 Stat. 3, 17.

205. Act of May 30, 1908, 35 Stat. 558.

206. Act of June 4, 1920, 41 Stat. 751.

1921;[207] and the Osage Allotment Act of 1906, as amended.[208]

It will be seen that these acts are generically different from the 1926 Act. Each of them is much more extensive in size and detail than the Northern Cheyenne Act,[209] vastly more pervasive in its assault on the system of tribal property, and far more liberal in its relinquishment of the incidents of the trust stewardship over tribal members and their allotments.

These other allotment acts have the following very significant characteristics, *not* contained in the Northern Cheyenne Act. *All* provide for the disposition of essentially the entire surface of the Reservation—by allotment to tribal members, or, by allotment of portions to tribal members and sale of the remainder to whites. *None* contain provisions remotely comparable to the all-encompassing reserved control and management provisions in sections 1 and 3 of the Northern Cheyenne Act. The Crow and Osage acts provide for distribution of the tribal treasury, declarations of competency for tribal members, and liberal alienability of allotted lands. The Blackfeet and Fort Peck acts also provide for distribution of the tribal treasury, and the Fort Belknap act bestows United States citizenship on the allottees and subjects them to state, civil and criminal laws. Summarily, the attribute these acts share, in con-

207. Act of March 3, 1921, 41 Stat. 1355.

208. Act of June 28, 1906, 34 Stat. 539; Act of March 3, 1909, 35 Stat. 778; Act of March 3, 1921, 41 Stat. 1249.

209. The Northern Cheyenne Allotment Act is 2 pages long and has 4 sections. In contrast, the Blackfeet act has 5 pages; the Fort Peck act has 6¼ pages and 16 sections; the Crow act has 6½ pages and 18 sections; the Fort Belknap act has 4¼ pages and 8 sections; and the Osage act has 6 pages and 12 sections.

trast to the Northern Cheyenne Act, is a significant relinquishment of federal control and responsibility in furtherance of Congress' desire to dismantle these tribal systems.

5. The 1968 Amendment Was An Exemplary Exercise of Congress' Plenary Power Over Indian Affairs and Comports With Current Public Policy.

Through the mid-1960's the intent of the 1926 Congress —that mineral development on the Northern Cheyenne Reservation inure to the benefit of the Northern Cheyenne people—was unrealized. The vast coal reserve beneath the Reservation remained dormant.[210] However, it presently became clear that the 1928 observation of Senate Investigator Liggett[211]—

> The entire Tongue River Reservation is underlaid with a thick vein of coal. There are frequent outcroppings. This coal seems to be a cross between lignite and bituminous coal and is of a fairly high quality . . . . . .
>
> The coal on Tongue River Reservation cannot be developed commercially at this time, owing to lack of rail facilities. There is no doubt, however, that some time the coal will prove a valuable asset.

was indeed prophetic.

In the late 1960's, national energy needs projected the untapped Northern Cheyenne coal reserve into the American energy arena. Rising national energy demands, new coal conversion techniques, and the superior economics of strip mining over deep mining created intense interest in western coal reserves. Moreover, the low sulphur content of the western coal made it especially attractive in light of

210. S. Rep. No. 1123, 90th Cong., 2d Sess. 2, 4 (1968).

211. *See* note 162, *supra*.

increasingly stringent air pollution standards, which traditional eastern coal could not meet.[212]

Prime among these western coal deposits is the immense Northern Cheyenne reserve. Totaling approximately 5.2 billion tons, it spans the entire Reservation.[213] Unusually great bed thicknesses, low overburdens, and gently rolling terrain render this coal ideal for strip mining.[214] The result: Northern Cheyenne coal has been elevated into a position of national significance with an economic value of no less than two billion dollars.[215] Major energy companies, including the Peabody, Amax, and Consolidation coal companies began pursuing rights to mine this coal.[216]

However, it became clear to the Cheyennes and to responsible government officials, that, while coal development on the Reservation might lift the people out of intense poverty, it might also result in destruction of the Northern Cheyenne culture. This culture is a product of a unique history, which caused Congress to wait until 1926 before enacting an allotment plan for the Northern Cheyennes. Congress then enacted the most limited of allotment acts, not providing for the opening of the Reservation to white

212. Coal Age, Mid-April 1973, Vol. 78, No. 5 at 41-48, 57-68.

213. U.S. Bureau of Mines, *Mineral Resources and Their Potential on Indian Lands—Northern Cheyenne Reservation, Big Horn and Rosebud Counties* 23 (unpublished).

214. The Montana Bureau of Mines and Geology estimates that one 13,560 acre section of the Reservation averages 88,500 recoverable tons per acre. Montana Dep't of Intergovernmental Relations—Division of Planning and Economic Development, Northern Cheyenne Planning Study 10 (1973).

215. This is a conservative estimate based on a recent offer by Shell Oil Company to the Crow Indian Tribe for coal located beneath the Crow Reservation, which adjoins the Northern Cheyenne Reservation on the west. Billings [Montana] Gazette, July 9, 1975, at 1, col. 1.

216. N. Y. Times, Aug. 22, 1971, at 1, col. 8.

settlement.[217] As a result, the Reservation today remains 98 per cent within Indian ownership.[218] Traditional grazing, farming, and timbering activities remain the predominant land uses. The absence of industrial development has left fully intact the grassy high plains and rolling hills. The Reservation population is overwhelmingly Indian; approximately 3,000 of some 3,600 enrolled Northern Cheyennes live on the Reservation.[219] Moreover, the Northern Cheyennes have retained the integrity of their Indian culture, the Cheyenne language is widely spoken, and traditional customs and rituals are practiced. In summary, the Northern Cheyenne Reservation remains what it has been from its inception: a homeland for a distinct Indian people and culture.

Strip mining, however, would affect every aspect of Reservation life and every member of the Reservation community. It would raise fundamental questions about the continued viability of the Reservation as a homeland.[220] Consequently, decisions concerning development require a deep sense of awareness of *all* competing benefits and costs. The United States Congress concluded that only the Northern Cheyenne people *as a whole* should make decisions concerning—and benefit from—coal development.[221] Pursuant to its duty and power as trustee, Congress implemented this determination by enacting the 1968 Amendment which maintains the Tribe as a whole as decisionmaker and beneficiary with respect to Reservation mineral development.[222]

The decision of the court below, however, annulled that congressional determination on constitutional grounds. The result will be chaotic decisionmaking with regard to 53 per cent of the coal reserve, and, potentially, a disastrous land rush reminiscent of those which devastated the oil-rich Indian reservations of Oklahoma.[223] Decisions regarding development of that portion of the reserve will thus be made simply on the basis of the economic self-interests of the individual members of the respondent class,[224] without

217. By contrast, sale of unallotted lands to whites was a key element of the allotment acts given other allotted reservations in Montana. Crow: Act of June 4, 1920, 41 Stat. 751; Blackfeet: Act of March 1, 1907, 34 Stat. 1015, 1035; Fort Peck: Act of May 30, 1908, 35 Stat. 558; Flathead: Act of April 23, 1904, 33 Stat. 302.

218. MONTANA DEP'T OF INTERGOVERNMENTAL RELATIONS—DIVISION OF PLANNING AND ECONOMIC DEVELOPMENT, NORTHERN CHEYENNE PLANNING STUDY 34 (1973).

219. *Id.* at 45.

220. Washington Post, June 11, 1973, at A1, Col. 1; N. Y. Times, Feb. 5, 1973, at 19, col. 1.

221. H. R. REP. No. 1292, 90th Cong., 2d Sess. (1968); S. REP. No. 1145, 90th Cong., 2d Sess. (1968)

222. Secretary of the Interior Rogers C. B. Morton held similarly in a decision on a Tribal petition concerning coal development on the Reservation presented directly to him in January, 1974. After extensive personal deliberation, Secretary Morton held:

> As trustee I take cognizance of my responsibility to preserve the environment and culture of the Northern Cheyenne Tribe and will not subvert these interests to anyone's desires to develop the natural resources on that Reservation.
>
> . . . . Furthermore, the Tribe and the coal companies may be assured that the terms and conditions upon which mineral development may proceed on the Northern Cheyenne Reservation will require their joint agreement and support prior to any further approval by me.

DEP'T OF THE INTERIOR, Written Decison of Secretary of the Interior Rogers C. B. Morton Regarding Northern Cheyenne Coal Development (June 4, 1974) (unpublished). This determination is reaffirmed in the Memorandum Setting Forth the Views of the Department of the Interior. Memorandum for the United States at 13-15, filed herein.

223. A. DEBO, AND STILL THE WATERS RUN—THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 86-88, 285-90, 294, 336-50 (1972 ed.).

224. This is a disparate group consisting primarily of tribal members, but also including a substantial number of non-member Indians and whites. Many of these people live far from the Reservation, and have no immediate interest in the general welfare of the residents of the Reservation. *See* notes 6 & 7, *supra*.

regard to the general welfare of the Tribe as a whole. Moreover, since each allotment is multiply-owned, each member of the class will control only a fractional interest in the minerals under his own allotment. Therefore, he will be vulnerable to unscrupulous land speculators who historically have descended upon newly-allotted reservations to exploit the distributed lands and resources.[225] Indeed, in 1934,[226] Congress acted to end permanently the allotment system because of the massive Indian land losses produced by this system.[227] It would be tragically ironic if that scenario were reenacted on the Northern Cheyenne Reservation in 1976 because of a future allotment provision enacted in 1926, only eight years prior to Congress' closing of the allotment chapter of American Indian history.

These dangers have resulted directly from the Ninth Circuit's decision striking down the 1968 Amendment on constitutional grounds. That erroneous and drastic judicial action requires reversal by this Court.

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225. Cohen, *Handbook of Federal Indian Law* 215-17 (1941). In fact, promptly after the court below entered its decision, such persons appeared on the scene to "assist" the allottees in marketing their coal interests. One approach suggested the formation of a society "to assist members with money matters so that they and their heirs will receive monthly checks for 100 years or more." These efforts continue. Hardin [Montana] Herald, Nov. 27, 1975, at 9, col. 3; Billings [Montana] Gazette, Nov. 12, 1975, at 1, col. 1.

226. Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§ 461-62 (1970).

227. Hearings on H. R. 7902 Before the House Committee on Indian Affairs, 73d Cong., 2d Sess. 15-18 (1934). During the period of the allotment policy, 1887-1934, staggering damage was done to the Indian land base—90 million acres were lost. THE INDIAN, AMERICA'S UNFINISHED BUSINESS 20 (S. Aberle & W. Brophy ed. 1966).

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

December 12, 1975

ZIONTZ, PIRTLE, MORISSET,
ERNSTOFF & CHESTNUT
By STEVEN H. CHESTNUT
Counsel for Petitioner

APPENDIX

NORTHERN CHEYENNE ALLOTMENT ACT OF 1926

Act of June 3, 1926, 44 Stat. 690

An Act to provide for allotting in severalty lands within the Northern Cheyenne Indian Reservation in Montana, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Northern Cheyenne Indian Reservation heretofore set apart by Executive order dated the 19th day of March, 1900, for the permanent use and occupation of the Northern Cheyenne Indians in Montana, be, and the same is hereby, declared to be the property of said Indians, subject to such control and management of said property as the Congress of the United States may direct.

Sec. 2. That the Secretary of the Interior be, and he is hereby, authorized to cause to be prepared a complete roll containing the names of all said Northern Cheyenne Indians now living, for whom said reservation was set apart as aforesaid, which roll, when approved by him, shall be the basis for allotting the land on said reservation, as herein provided. The Secretary of the Interior shall also cause to be prepared, in such manner as he may deem advisable, a list of the lands of said Indian reservation and to classify the same as agricultural, grazing, and land chiefly valuable for the timber thereon. As soon as practicable after the approval of said tribal roll and after the approval of said list of lands classified as above provided, the Secretary of the Interior is hereby authorized to allot in severalty lands classified as agricultural and grazing to the duly enrolled Indians in areas not exceeding one hundred and sixty acres to any individual from the lands appearing on said approved list: *Provided,* That in allotting said lands each Indian shall be allotted a proportion of the agricultural and grazing lands, respectively, such lands whenever practicable and so far as possible to be contiguous: *Provided,* That trust patents shall be issued therefor of the form and legal effect authorized by the

Act of February 8, 1887 (Twenty-fourth Statutes at Large, page 388), as amended, and the lands so allotted and patented shall be designated in each case as a "homestead," which homestead shall remain inalienable and nontaxable for a period of twenty-five years from the date of issuance of patent therefor, or until the death of the allottee.

The right is hereby reserved to any Indian to select as his allotment a tract occupied by him at the time of the approval of this Act, though such lands or a part thereof may be classified as timber lands.

Sec. 3. That the timber, coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved for the benefit of the tribe and may be leased with the consent of the Indian council under such rules and regulations as the Secretary of the Interior may prescribe: *Provided,* That at the expiration of fifty years from the date of the approval of this Act the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall become the property of the respective allottees or their heirs: *Provided further,* That the unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians.

Sec. 4. That authority is hereby vested in the Secretary of the Interior to cause to be reserved so long as they are needed and used for the benefit of the Northern Cheyennes, suitable lands for the following purposes: For school, agency, and other administrative purposes, including not to exceed one thousand two hundred and eighty acres for the boarding school at Busby, Montana, and not to exceed one hundred and sixty acres for the Birney Day School, in all not exceeding two thousand seven hundred and eighty acres; for tribal cemeteries, where needed, not to exceed in all one hundred and sixty acres: *Provided,* That with the consent of the tribal council, lands may be reserved for religious and educational purposes, including parsonage, church, cemetery, and garden sites, not to exceed forty acres at any one point; for recreational purposes having an educational feature, not to exceed ten

acres at any one point; for public-school purposes, not to exceed two and one-half acres at any one point: *Provided further,* That such tracts, excepting only the tribal cemeteries, shall remain reserved only so long as they are used for the purposes for which they are set apart: *And provided further,* That the organizations now engaged in educational and religious work on the reservation shall not be disturbed in their occupancy of the sites heretofore set apart under authority of the Secretary of the Interior so long as they continue to be used solely in the advancement of religious and welfare work for the benefit of the Northern Cheyenne Indians: *And provided further,* That the Secretary of the Interior is hereby authorized to reserve and set aside for town-site purposes not more than eighty acres at Lame Deer, Montana, and not to exceed forty acres at some other suitable location, and to survey and plat said tracts in blocks, lots, streets, alleys, parks, and school sites: *Provided further,* That the area reserved for park and school sites shall not exceed ten acres in any one town site, and patent shall be issued for such lands to the municipality legally charged with the care and custody of the lands hereby set aside for such purposes. That such town sites shall be appraised and disposed of as provided in section 2381 of the Revised Statutes: *Provided further,* That all the income of said tribe from rents, royalties, or other profits accruing from the sale of any timber, coal, or other minerals, including oil, gas, and other natural deposits herein reserved for the benefit of the said Indians, including proceeds from sales of town lots, shall be deposited in the Treasury of the United States to the credit of the Northern Cheyenne Indians and be subject to expenditure for their benefit in such manner as Congress may direct. An area not exceeding sixty feet on either side of every section line within the said reservation is hereby dedicated as public highways whenever and so far as the same may be so declared by the county commissioners of the county in which the same may be situated, and all allotments and patents hereby authorized shall be subject to the easement hereby created. In addition to reservations heretofore herein authorized the Secretary of the Interior shall withhold from allotment any tracts in legal subdivisions

in which are springs or other like sources of water supply to which cattle have been accustomed to repair for drink, together with so much land contiguous thereto as may be necessary to permit access by stock to such water supply from the highways herein provided for.

Sec. 5. That there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $30,000, or so much thereof as may be necessary, to pay the expenses of making the tribal roll, of compiling the list of lands on said reservation, for the necessary surveys and classifications, and all other expenses in connection with the allotment work: *Provided,* That the sum of $2,500 shall be available for the payment of the expenses of the tribal Indian council in holding meetings on said reservation and for the expenses of delegates which such council may have heretofore sent, or may hereafter send, to the city of Washington on tribal business.

1947 AMENDMENT TO NORTHERN CHEYENNE ALLOTMENT ACT

Act of July 24, 1947, 61 Stat. 418

An Act to declare the ownership of the timber on the allotments on the Northern Cheyenne Indian Reservation, and to authorize the sale thereof.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding the provisions of the Act of June 3, 1926 (44 Stat. 690), the timber on the allotments on the Northern Cheyenne Indian Reservation, whether or not the lands were hitherto classified as chiefly valuable for timber, are hereby declared to be the property of the allottees and may hereafter be sold pursuant to the provisions of section 8 of the Act of June 25, 1910 (36 Stat. 857; 25 U.S.C., sec. 406). Nothing contained in this Act shall be construed to require the payment to the allottees of the proceeds of sales made prior to the passage of this Act.

1961 AMENDMENT OF NORTHERN CHEYENNE ALLOTMENT ACT

Act of September 22, 1961, 75 Stat. 586

An Act to grant minerals, including oil, gas, and other natural deposits, on certain lands in the Northern Cheyenne Indian Reservation, Montana, to certain Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3 of the Act of June 3, 1926 (44 Stat. 690), as amended by the Act of July 24, 1947 (61 Stat. 418), is hereby amended to read as follows:

"Sec. 3. (a) The coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved for the benefit of the tribe and may be leased with the consent of the Indian council for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396 a-f), under such rules, regulations, and conditions as the Secretary of the Interior may prescribe: *Provided,* That at the expiration of fifty years from the date of the approval of this Act, the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall become the property of the respective allottees or their heirs or devisees, subject to any outstanding leases, regardless of any prior conveyance by such allottee, heirs, or devisees of the land overlying such minerals, oil, gas or other natural deposits and regardless of the form of reference in such conveyance, or lack of reference, to the minerals, oil, gas, or other natural deposits reserved by this Act.

"(b) Title to the minerals so granted shall be held by the United States in trust for the Indian owners, except that if upon the expiration of said fifty years the entire Indian interests in the minerals within any allotment or parcel thereof is granted by this Act to a person or persons who at that time hold an unrestricted title to the lands overlying such minerals, oil, gas, or other natural deposits, then the Secretary of the Interior shall by fee patent transfer to such person or persons the unrestricted fee simple

title to such minerals, oil, gas, or other natural deposits, which title shall vest in such person or persons as of the date of the patent.

"(c) The unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians."

1968 AMENDMENT OF NORTHERN CHEYENNE ALLOTMENT ACT

Act of July 24, 1968, 82 Stat. 424

An Act to grant minerals, including oil, gas, and other natural deposits, on certain lands in the Northern Cheyenne Indian Reservation, Montana, to certain Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3 of the Act of June 3, 1926 (44 Stat. 690), as amended by the Act of July 24, 1947 (61 Stat. 418), and the Act of September 22, 1961 (75 Stat. 586), is hereby amended to read as follows:

"Sec. 3 (a) The coal or other minerals, including oil, gas and other natural deposits, on said reservation are hereby reserved in pepetuity for the benefit of the tribe and may be leased with the consent of the Indian council for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396 a-f), under such rules, regulations, and conditions as the Secretary of the Interior may prescribe.

"(b) The unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians."

SEC. 2. The Northern Cheyenne Tribe is authorized to commence in the United States District Court for the District of Montana an action against the allottees who received allotments pursuant to the Act of June 3, 1926, as amended, their heirs or devisees, either individually or as a class, to determine whether under the provisions of

the Act of June 3, 1926, as amended, the allottees, their heirs or devisees, have received a vested property right in the minerals which is protected by the fifth amendment. The United States District Court for the District of Montana shall have jurisdiction to hear and determine the action and an appeal from its judgment may be taken as provided by law. If the court determines that the allottees, their heirs or devisees, have a vested interest in the minerals which is protected by the fifth amendment, or if the tribe does not commence an action as here authorized within two years from the date of this Act, the first section of this Act shall cease to have any force or effect, and the provisions of section 3 of the Act of June 3, 1926, as amended by the Acts of July 24, 1947, and September 21 [*sic*], 1961, shall thereupon be carried out as fully as if section 3 had not been amended by this Act.

Executive Order of November 26, 1884

Establishing Northern Cheyenne Reserve.

It is hereby ordered that the following-described country, lying within the boundaries of the Territory of Montant, viz: Beginning at the point on the one hundred and seventh meridian of west longitude (said meridian being the eastern boundary of the Crow Indian Reservation) where the southern 40-mile limits of the grant to the Northern Pacific Railroad Company intersects said one hundred and seventh meridian; thence south along said meridian to a point 30 miles south of the point where the Montana base line, when extended, will intersect said meridian; thence due east to a point 12 miles east of the Rosebud River; thence in a northerly and northeasterly direction, along a line parallel with said Rosebud River and 12 miles distant therefrom, to a point on the southern 40-mile limits of the grant to the Northern Pacific Railroad Company, 12 miles distant from said Rosebud River; thence westerly along the said southern limits and across the said Rosebud River to the place of beginning, be, and the same is hereby, withheld from sale and settlement, and set apart as a reservation for the use and occupation of the Northern Cheyenne Indians, now residing in the southern portion of Montana Territory, and such other Indians as the Secretary of

the Interior may see fit to locate thereon: *Provided, however*, That any tract or tracts of land included within the foregoing described boundaries which have been located, resided upon, and improved by bona fide settlers, prior to the 1st day of October, 1884, to the amount to which such settlers might be entitled under the laws regulating the disposition of the public lands of the United States, or to which valid rights have attached under said laws, are hereby excluded from the reservation hereby made.

CHESTER A. ARTHUR

Executive Order of March 19, 1900

Enlarging Northern Cheyenne Reserve

It is hereby ordered that the following-described tract of land lying in the State of Montana, the same being the tract described in Senate bill 2173, 56th Congress, 1st session, which tract includes the lands embraced in the boundaries set forth in Executive order issued November 26, 1884, relative to the Northern Cheyenne reserve, be, and the same is hereby, withdrawn from sale and settlement and set apart as a reservation for the permanent use and occupation of the Indians now occupying or belonging upon the Northern Cheyenne Reservation, which reservation shall be known as the Northern Cheyenne Indian Reservation, viz:

Beginning at the point in the middle of the channel of Tongue River at its intersection with the southern forty-mile limits of the grant to the Northern Pacific Railroad Company; thence west on the said southern forty-mile limits to its intersection with the eastern boundary line of the Crow Indian Reservation; thence south on said boundary line to its intersection with the line dividing townships five and six south; thence east on said dividing line of townships five and six south; to its intersection with the line dividing ranges forty and forty-one east; thence north on said line dividing ranges forty and forty-one east to the line dividing townships four and five south; thence east on the line dividing townships four and five south to its intersection with Cook Creek; thence down Cook Creek to its confluence with Tongue River; thence down the

middle of the channel of Tongue River to the place of beginning: *Provided, however*, That if upon the survey or resurvey of the boundary lines already established it shall be found that the main stream of Cook Creek on or near the range line between ranges forty and forty-one lies south of the line dividing townships four and five south, then in that case the line running north on the range line between ranges forty and forty-one shall extend north only to the intersection of said line with the main stream of Cook Creek, and thence down Cook Creek as hereinbefore provided: *Provided further*, That in the erection of the reservation boundary fence along said Cook Creek the same shall be so erected as to divide the waters as near as may be between the north and south sides thereof: *Provided further*, That certain tracts approximating sixty-five acres, lying west of Tongue River, in sections twenty-six and thirty-four south, of range forty-three east, owned by Joseph Scott, and the northeast quarter of section three in township three south, of range forty-four east, belonging to Saint Labra's Mission, and the south half of the northwest quarter of section ten in township two south, of range forty-four east, belonging to R. P. Colbert, and the south half of section seven, in township two south, range forty-four east, belonging to John Barringer, shall be excepted from and not included within the reservation boundaries named.

WILLIAM MCKINLEY

SELECTED LEGISLATIVE HISTORY OF NORTHERN CHEYENNE ALLOTMENT ACT OF 1926

The Original Bill—H.R. 9558, 69th Cong., 1st Sess. (1926)

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 19, 1926

MR. LEAVITT introduced the following bill; which was referred to the Committee on Indian Affairs and ordered to be printed

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A BILL

To provide for allotting in severalty agricultural lands within the Tongue River or Northern Cheyenne Indian Reservation in Montana, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized to cause to be prepared a complete roll containing the names of all Indians ascertained to have rights on the Tongue River or Northern Cheyenne Indian Reservation in Montana, which roll, when approved by him, shall be final and conclusive evidence of the right of any Indian of that reservation to an allotment of land thereon. The Secretary of the Interior shall also cause to be prepared, in such manner as he may deem advisable, a list of the lands of said Indian reservation, exclusive of timbered lands, which may be used advantageously for agricultural purposes, without detriment to the use of the remaining tribal lands for grazing purposes: *Provided,* That as soon as practicable after the approval of said tribal roll, and after the approval of said list of agricultural lands, the Secretary of the Interior is hereby authorized to make allotments in severalty to the duly enrolled Indians in areas not exceeding eighty acres to any individual, from the lands appearing on said approved list; which allotments shall be made under such regulations as he may prescribe and trust patents shall be issued therefor of the form and legal effect authorized by the Act of

February 8, 1887 (Twenty-fourth Statutes at Large, page 388), as amended by the Act of May 8, 1906 (Thirty-fourth Statutes at Large, page 182).

SEC. 2. That prior to making the allotments as authorized herein the Secretary of the Interior shall cause an examination to be made by representatives of the Geological Survey of all lands included on said approved list as available for allotting, for the purpose of determining the mineral character thereof, also their power or reservoir possibilities; and if any of the land shall be found to contain coal or other minerals, only the surface thereof may be allotted, and all minerals on said lands are hereby reserved for the benefit of the tribe: *Provided,* That at the expiration of fifty years from the date of the approval of this Act, the coal or other mineral deposits of said allotments shall become the property of the respective allottees or their heirs or assigns.

SEC. 3. That there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $10,000, or so much thereof as may be necessary, to pay the expenses of making the tribal roll, of compiling the list of lands suitable for allotting, for the necessary surveys and classifications, and all other expenses in connection with the allotment work.

House Committee on Indian Affairs Report—H.R. REP. NO. 383, 69th Cong., 1st Sess. (1926)

AGRICULTURAL LANDS WITHIN THE TONGUE RIVER OR NORTHERN CHEYENNE INDIAN RESERVATION, MONT.

FEBRUARY 25, 1926.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

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Mr. LEAVITT, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany H. R. 9558]

The Committee on Indian Affairs, to whom was referred the bill (H. R. 9558) to provide for allotting in severalty agricultural lands within the Tongue River or Northern Cheyenne Indian Reservation in Montana, and for other purposes, having considered the same, report thereon with a recommendation that it do pass with the following amendments:

Page 1, line 9, after the word "reservation," insert the words "upon said roll."

Page 2, line 22, strike out all of line 22 and the word "minerals," in line 23, and insert "*Provided, however,* That."

Page 2, line 23, strike out the word "thereof" and insert the following, "of any lands in this reservation."

Page 2, line 25, after the word "provided," insert the word "further."

This bill is recommended by the Secretary of the Interior, as evidenced by the attached letter, which is made a part of this report.

DEPARTMENT OF THE INTERIOR,
Washington, February 17, 1926.

Hon. SCOTT LEAVITT,
Chairman Committee on Indian Affairs,
House of Representatives.

MY DEAR MR. LEAVITT: Your attention is respectfully invited to the inclosed draft of a proposed bill authorizing the Secretary of the Interior to allot agricultural lands of the Tongue River or Northern Cheyenne

Indian Reservation in Montana to the Indians of that reservation in areas not exceeding 80 acres to each individual.

The records show that there are approximately 1,408 Indians on that reservation and the area is 489,500 acres. The reservation was established by Executive orders of November 26, 1894 [*sic*], and March 19, 1900. Up to the present none of the lands there have been allotted in severalty for the reason that it has been thought best to keep the entire reservation in tribal status for general grazing purposes. It is now believed that a part of the agricultural lands may be advantageously allotted by exercising care to group the allotments so as not to interfere with the grazing industry. In order to avoid difficulty in protecting the grazing area from allotment selections it is deemed advisable to have the agricultural lands that may be allotted officially listed before the allotment selections are made and also have it understood that only lands included on the approved list may be selected.

The proposed bill also provides for the preparation of a roll of the Indians having rights on that reservation; also for a report by the Geological Survey, covering the lands that may be listed for allotment, as to coal and other mineral deposits and as to power or reservoir sites. In the event any of the land listed for allotting is found to contain coal or other minerals, it is contemplated to reserve all such minerals for the tribe and to allot the surface only. Timbered lands are also to be excluded from the list of lands available for allotment selections.

It will be necessary to provide funds to cover the expenses of preparing the roll of eligible Indians and of listing the lands available for allotting, as well as the general expenses of surveying and marking the allotment selections; therefore the authorization of an appropriation of $10,000, or as much thereof as may be needed, has been included in the proposed legislation. The draft of the proposed bill as submitted covers the various features discussed, and the favorable consideration thereof is respectfully recommended to your committee and the Congress.

The Bureau of the Budget advised on February 1, 1926, that the appropriation would not be in conflict with the financial program of the President.

Very truly yours,

HUBERT WORK.

Senate Committee On Indian Affairs Report—S. REP. NO. 638, 69th Cong., 1st Sess. (1926)

ALLOTTING IN SEVERALTY AGRICULTURAL LANDS WITHIN TONGUE RIVER OR NORTHERN CHEYENNE INDIAN RESERVATION, MONT.

APRIL 19 (calendar day, APRIL 21), 1926.—Ordered to be printed

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Mr KENDRICK, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany H. R. 9558]

The Committee on Indian Affairs, to whom was referred the bill (H. R. 9558) to provide for allotting in severalty agricultural lands within the Tongue River or Northern Cheyenne Indian Reservation in Montana, and for other purposes, having considered the same, report favorably thereon with the recommendation that the bill do pass with the following amendments:

Strike out all after the enacting clause and insert in lieu thereof the following:

That the Northern Cheyenne Indian Reservation heretofore set apart by Executive order dated the 19th day of March, 1900, for the permanent use and occupation of the Northern Cheyenne Indians in Montana be, and the same is hereby, declared to be the property of said Indians, subject to such control and management of said property as the Congress of the United States may direct.

SEC. 2. That the Secretary of the Interior be, and he is hereby, authorized to cause to be prepared a complete roll containing the names of all said Northern Cheyenne Indians, for whom said reservation was set apart as aforesaid, and their heirs, which roll, when approved by him, shall be the basis for alloting the land on said reservation, as herein provided. The Secretary of the Interior shall also cause to be prepared, in such manner as he may deem advisable, a list of the lands of said Indian reservation and to classify the same as agricultural, grazing, and land chiefly valuable for the timber thereon. As soon as practicable after the approval of said tribal roll and after the approval of said list of lands classified as above provided, the Secretary of the Interior is hereby authorized to allot in severalty to the duly enrolled Indians in areas not exceeding 160 acres to any individual from the lands appearing on said approved list: *Provided*, That in allotting said lands each Indian shall be allotted a proportion of the agricultural, grazing, and timberlands, respectively: *And provided further*, That any Indian desiring to secure contiguous territory for his allotment may be allotted grazing land in lieu of his or her proportion of agricultural land and trust patents shall be issued therefor of the form and legal effect authorized by the act of February 8, 1887 (Twenty-fourth Statute [*sic*], page 388), as amended.

SEC. 3. That the timber, coal or other minerals, including oil, gas, and other natural deposits on said reservation, are hereby reserved for the benefit of the tribe: *Provided*, That at the expiration of fifty years from the date of the approval of this act the coal or other minerals, including oil, gas, and other natural deposits of said allotments shall become the property of the respective allottees or their heirs: *Provided further*, That the unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians.

SEC. 4. That before any allotment shall be made as herein authorized there shall be reserved on said reservation sufficient land for schools, agency, cemetery, town site, recreation, and missionary purposes: *Provided*, That no such reservation shall exceed five acres for public schools, six hundred and forty acres for agency, one hundred and sixty acres for recreation purposes, five acres for cemetery purposes, two acres for missionary purposes, and eighty acres for town site purposes at Lame Deer, Montana, and forty acres elsewhere; said town sites to be platted and subdivided in lots, streets, and alleys in accordance with rules and regulations to be prescribed by the Secretary of the Interior: *Provided further*, That the Secretary of the Interior shall be authorized to lease, sell, or otherwise dispose of said lots within said town sites in accordance with existing law, and such mercantile timber as may be on unallotted lands, and to deposit the avails thereof in the Treasury of the United States to the credit of the Northern Cheyenne Indians: *Provided further*, That all the income of said tribe from rents, royaltics, or other profits accruing from sale of any timber, coal, or other minerals, including oil, gas, and other natural deposits herein reserved for the benefit of the said Indians, including proceeds from sales of town lots, shall be distributed per capita to said Indians on the 1st day of July and the 1st day of January in each year, except 10 per centum thereof, which shall be applied and expended for the education of the children of said Indians: *Provided further*, That said 10 per centum fund shall be used proportionately among such children to be educated, and the said Indians shall be subject to the laws of the State of Montana with reference to compulsory education.

SEC. 5. That there is hereby authorized to be appropriated out of any money in the Treasury not otherwise appropriated, the sum of $30,000, or so much thereof as may be necessary to pay the expenses of making the tribal roll, of compiling the list of lands on said reservation, for the necessary surveys and classifications, and all other expenses in connection with the allotment work: *Provided*, That the sum of $2,500 shall be available for the payment of the expenses of the tribal Indian council in holding meetings on said reservation and for the expenses of delegates which such council may have heretofore sent, or may hereafter send, to the City of Washington on tribal business.

Amend the title to read as follows: "To provide for allotting in severalty lands within the Northern Cheyenne Indian Reservation in Montana, and for other purposes."

This bill in its original form was introduced at the request of the department and the facts are set out in House Report No. 383, Sixty-ninth Congress, first session, which is attached hereto and made a part of this report.

An identical bill was introduced in the Senate at the department's request, and was numbered S. 3261. Later the Secretary of the Interior requested that the bill be amended by inserting a new section and his letter to that effect, under date of April 13, 1926, is also attached hereto and made a part of this report. The bill which your committee reports is similar to the departmental bill with the amendment suggested in the Secretary's letter of April 13, 1926.

[Next followed a reprint of the above House Committee on Indian Affairs Report. The report then concluded with the following letter.]

DEPARTMENT OF THE INTERIOR,
Washington, April 13, 1926.

Hon. J. W. HARRELD,
Chairman Committee on Indian Affairs,
United States Senate.

MY DEAR SENATOR HARRELD: Referring to Senate bill 3261 providing for the allotment of agricultural lands on the Tongue River and Northern Cheyenne Reservation in Montana, our attention is invited by the representatives of the General Council of Mennonites of North America to the fact that the omission therein of any provision which would protect their organization in its work for the benefit of the Indians of that reservation is embarrassing to them.

It is believed that mission organizations should not be disturbed in their occupancy of sites heretofore set apart for their use under department authorities. There will undoubtedly be need for extension of their work or for the establishment of missions of other denominations as the Indians themselves advance. It is therefore requested that the bill be amended by changing the numbering of the present section 3 to section 4 and inserting after line 4 on page 3 a new section 3 to read as follows:

"SEC. 3. That authority is hereby vested in the Secretary of the Interior to cause to be reserved, so long as they are needed and used for the benefit of the Northern Cheyennes, suitable lands for the following purposes: For school, agency and other administrative purposes not to exceed in all six hundred and forty acres; for tribal cemeteries at points needed, not to exceed in all one hundred and sixty acres; with the consent of the tribal council lands required for religious and educational purposes including parsonage, church, cemetery, and garden sites, not to exceed forty acres at any one point; for recreational purposes having an educational feature, not to exceed ten acres at any one point; for public-school purposes, not to exceed two and one-half acres at any one point: *Provided*, That such tracts excepting only the tribal cemeteries shall remain reserved only so long as they are used for the purposes for which they are set apart: *Provided further*, That the organizations now engaged in educational and religious work on the reservation shall not be disturbed in their occupancy of the sites heretofore set apart under authority of the Secretary of the Interior so long as they continue to be used solely in the advancement of religious and welfare work for the benefit of the Northern Cheyenne Indians."

There is no good reason why such provisions should not finally satisfy the Indians, since they place in the tribal council the right to pass upon all future petitions for mission sites. At the same time the rights of the present missions are fully protected.

It is requested that this proposed amendment receive your favorable action.

Very truly yours,

HUBERT WORK.

Supreme Court, U. S.
FILED
JAN 14 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-145

THE NORTHERN CHEYENNE TRIBE,

Petitioner,

v.

WILLIAM HOLLOWBREAST, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS ELVA L. LITTLECHIEF WILLIAMSON AND JAMES BOWEN

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

CASES iv

CONSTITUTIONAL PROVISIONS

STATUTES x

FEDERAL REGULATIONS x

OTHER AUTHORITIES x

ISSUES PRESENTED 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT 7

I. THE NINTH CIRCUIT DID NOT ERR BY RE-AFFIRMING THE PRINCIPLES SET FORTH IN CHOATE V. TRAPP APPLYING DUE PROCESS LIMITS TO CONGRESS' OTHERWISE PLENARY POWER OVER INDIAN AFFAIRS 7

A. The Background Of The Allotment System Clarifies The Nature Of The Rights Involved 7

B. The Constitutional Protection Of Respondent's Interest In The Mineral Estate Is Established In Choate v. Trapp 15

1. Choate v. Trapp and Gritts v. Fisher, When Read Together, Explain But Limit Congress' Plenary Power over Indians By Providing Due Process Protection Of Individual Indian Property Rights 15

2. The Decision In Choate v. Trapp Is Based On Statutory, Not Contractual Rights 22

Page

(a) The Tribal "Contract" Rights Theory Of Choate v. Trapp Is Rejected By The Specific Language Of The Choate Decision 22

(b) Petitioner's Tribal "Contract" Rights Theory Of Choate v. Trapp Is Rejected By The Express Language Of Gritts v. Fisher 24

(c) Petitioner's Tribal "Contract" Theory Of Choate v. Trapp Is Rejected By Substantial Case Law Following Choate 24

(d) Petitioner's "Contract" Rights Theory Of Choate v. Trapp Is Rejected By The Interpretation Of The Leading Scholar In The Field 26

(e) "Contractual" vs. "Non-Contractual" Categorization Of Allotment Rights Cannot Remove Such Rights From The Scope Of Due Process Protection 28

C. Respondents' Rights In Their Allotments Vested When They Selected The Land And Submitted Their Application For The Trust Patent 30

II. THE 1926 ALLOTMENT ACT OPERATED TO CONVEY AN IMMEDIATELY VESTING (UPON FILING THE ALLOTMENT APPLICATION) INTEREST IN THE MINERALS AT ISSUE 33

A. The Legislative History Of The 1926 Act Reveals That Congress Knowingly Rejected Any Proposed Delay In Vesting The Minerals Underlying Allotment Lands 33

Page

B. Neither The 1926 Allotment Act Nor The Language Of The Trust Patents Reserve Any Power To Congress To Divest The Allottees' Mineral Interest 35

C. When Congress Intended To Reserve The Power To Extend Tribal Ownership Of Minerals It Included The Requisite "Unless Otherwise Provided By Congress" Proviso In The Allotment Act's Grant Of Minerals. The Unusual Absence Of This Proviso Indicates Congress' Intent To Immediately Vest The "Remainder" Interest In The Minerals In The Allottees 40

D. Congress' Specifically Requiring The Tribal Council To Quiet Title In The Minerals Indicates Strong Congressional Doubt As To The Constitutionality Of The 1968 Amendment 44

III. WHILE THE 1968 AMENDMENT OSTENSIBLY RE-ALLOCATES THE COAL TO THE TRIBAL COUNCIL, IT ACTUALLY ACCOMPLISHES A SUBSTANTIAL TAKING FOR NON-INDIAN PURPOSES. THEREFORE, THE 1968 AMENDMENT EXCEEDS CONGRESS' PLENARY POWER 46

IV. OWNERSHIP OF TRIBAL LAND, THE TRIBAL COUNCIL'S LEGISLATIVE AUTHORITY, AND SUPERVISION OF MINERAL LEASING BY THE SECRETARY OF INTERIOR, PROVIDE AMPLE MEANS OF REGULATING ANY ON-RESERVATION MINERAL DEVELOPMENT WITHOUT DIVESTING THE INTERESTS OF THE INDIAN ALLOTTEES 49

A. Ownership Of Tribal Land And The Tribe's Legislative Authority Provide The Tribe With Ample Means Of Regulating Any On-Reservation Mineral Development Without Divesting The Interests Of The Indian Allottees 49

Page

B. The Truly Protective Scope Of Federal Supervision Of On-Reservation Mineral Leasing Specifically Hinges On Mineral Ownership In The Respondent/Allottees 53

V. PETITIONER'S AUTHORITY DOES NOT SUPPORT IT'S THESIS OF UNBRIDLED CONGRESSIONAL POWER OVER INDIVIDUAL INDIAN PROPERTY RIGHTS 56

A. Tribal Property 57

B. Personal Status 62

C. The "In Praesenti" Grant Problem 67

D. The "In Lieu" Exchange of Public Lands Problem 70

E. Petitioner's Other Major Authority 74

CONCLUSION 81

TABLE OF AUTHORITIES

Cases: *Page*

Adams v. Osage Tribe, 59 F.2d 653 (10th Cir. 1932) 14, 40

Allotment Sections on the Fort Belknap Indian Reservation, 55 I.D. 295 (1935) ..... *passim*

Arenas v. United States, 322 U.S. 419 (1944) ..... *passim*

Arnett v. Kennedy, 416 U.S. 134 (1974) 29

Auga Caliente Band of Mission Indians County of Riverside, 306 F.Supp. 279 (C.D.Cal. 1969) 13, 17

Ballinger v. United States, 216 U.S. 240 (1909) 11, 12, 31

Barclay & Co. v. Edwards, 267 U.S. 442 (1924) 82

Benson Min. & Smelting Co. v. Alta Min. & Smelting Co., 145 U.S. 428 (1892) 31, 73

Blodgett v. Holden, 275 U.S. 142 (1927) 82

Board of County Commissioners v. Seben, 130 F.2d 663 (10th Cir. 1941) 13, 17

Page

Board of County Commissioners of Tulsa County, Oklahoma v. United States, 94 F.2d 450 (10th Cir. 1938) 13, 17

Boyd v. United States, 116 U.S. 616 (1885) 82

Brader v. James, 246 U.S. 88 (1918) 63, 66

British-American Oil Co. v. Board of Equalization, 299 U.S. 159 (1937) 57

Bryan County, Oklahoma v. United States, 123 F.2d 782 (10th Cir. 1941) 13, 17

Carpenter v. Shaw, 280 U.S. 363 (1929) 13,17,24,25,80

Carroll v. Greenwich Ins. Co., 199 U.S. 401 (1905) 82

Chase Jr. v. United States, 256 U.S. 1 (1921) 11,57

Chippewa Indians v. United States, 307 U.S. 1 (1938) 11,57,61

Choate v. Trapp, 224 U.S. 665 (1912) ..... *passim*

Choctaw Nation v. United States, 100 F.Supp. 318 (Ct.Cl. 1951) 13,17

C.I.R. v. Walker, 326 F.2d 261 (9th Cir. 1964) 14

County of Mahnomen v. United States, 319 U.S. 474 (1943) 12,15

Crews v. Burcham, 1 Black 352 (1862) 11,31,78

Davis v. Morton, 468 F.2d 593 (10th Cir. 1972) 54

Doe v. Wilson, 23 How. 457 (1859) 11,14,31,78

Elwood v. Flannigan, 14 Otto 562 (1882) 11,31,78

English v. Richardson, 224 U.S. 680 (1912) 12,13,15,17,24,25

Exploration Co. v. United States, 247 U.S. 435 (1918) 77

Federal Power Commission v. Tuscarora Indian Nation, 352 U.S. 99 83

Fish v. Wise, 52 F.2d 544 (10th Cir. 1931), cert. denied 282 U.S. 903 (1931) 12

Fleming v. Nestor, 363 U.S. 603 (1960) 28

Page

Glacier County, Montana v. United States, 99 F.2d 733 (9th Cir. 1938) 13,17

Gleason v. Wood, 224 U.S. 679 (1912) 12,13,17

Goat v. United States, 224 U.S. 458 (1912) 64,66

Goldberg v. Kelly, 397 U.S. 254 (1970) 28,29

Graham v. Richardson, 403 U.S. 365 (1971) 28,29

Gritts v. Fisher, 224 U.S. 640 (1912) ..... *passim*

Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146 (1919) 82

Hannah v. Larche, 363 U.S. 420 (1960) 83

Heckman v. United States, 224 U.S. 413 (1912) 12,64,66

Heiner v. Donnan, 285 U.S. 312 (1931) 82

Hy-Yu-Tse-Mil-Kin v. Smith, 194 U.S. 401 (1904) .. 11,12,31, 62,78

Jiminez v. Weinberger, 417 U.S. 628 (1974) 29

Jones v. Meehan, 175 U.S. 1 (1899) 13,17

Kennerly v. District Court, 400 U.S. 423 (1971) 51,52

Kirkwood v. Arenas, 243 F.2d 863 (9th Cir. 1957) 13,17

Kuehner v. Irving Trust Co., 299 U.S. 445 (1936) 82

Lane v. Santa Rosa, 249 U.S. 110 (1919) 47,48

Landman v. Comm'n Internal Revenue Service, 123 F.2d 787 (10th Cir. 1941) 13,17

LaRoque v. United States, 239 U.S. 62 (1915) 63,79

Leecy v. United States, 190 F. 289 (8th Cir. 1911) 11,12, 14,42,62,78

Levey v. Stockslager, 129 U.S. 470 (1889) 67

Louisville Joint State Land Bank v. Radford, 295 U.S. 555 (1935) 82

Lowe v. Fisher, 223 U.S. 95 (1912) 63

McCaskill Co. v. United States, 216 U.S. 504 77

McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973) 19

Monongahela Nav. Co. v. United States, 148 U.S. 312 (1893) 82

Page

Monson v. Simonson, 231 U.S. 341 (1913) 43

Morris v. Hitchcock, 194 U.S. 384 (1904) 52, 53

Morrissey v. Brewer, 408 U.S. 471 (1972) 28

Morrow v. United States, 243 F. 854 (8th Cir. 1971) 13, 17

Mott v. United States, 283 U.S. 747 (1931) 12, 15

Mullen v. United States, 224 U.S. 448 (1912) ... 12, 14, 40, 78

Nadeau v. Union Pacific Railroad, 253 U.S. 442 (1920) 11, 57

Nichols v. Coolidge, 274 U.S. 531 (1926) 82

Northern Cheyenne Tribe v. Northern Cheyenne Defendant Class of Allottees, Heirs and Devisees, 505 F.2d 268 (9th Cir. 1974) 5,6,46

Northern Cheyenne Tribe v. William Hollowbreast, 349 F.Supp. 1302 (D. Mont. 1972) 5,18

Ocho v. Hernandez y Morales, 230 U.S. 139 (1912) 82

Oklahoma Tax Comm'n v. United States, 319 U.S. 598 (1943) 12,15

Oliphant v. Schlie, ___ F.Supp. ___ No. 510-73C2 (W.D. Wash., April 5, 1974) 52

Oregon Shortline Ry. Co. v. Murray City, 2 Utah 427, 277 P.2d 798 (1954) 80

Payne v. Central Pacific Ry. Co., 255 U.S. 489 (1920) 31,72,73

Payne v. New Mexico, 255 U.S. 367 (1921) 11,31,71,73

Pka-O-Wah-Ash-Kum v. Sorin, 8 F. 740 (C.C.N.C. Ill. 1881) 11,78

Powers of Indian Tribes, 55 I.D. 14 (1934) 50

Raymond Bear Hill, 52 I.D. 688 (1929) ..... *passim*

Rights of Indians to Allotment in San Juan County, Utah, 57 I.D. 547 (1942) 11,12,30

Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604 (1949) 82

Page

Sherbert v. Verner, 374 U.S. 398 (1963) 28, 29

Shapiro v. Thompson, 394 U.S. 618 (1969) 28, 29

Sizemore v. Brady, 235 U.S. 441 (1914) ..... *passim*

Starr v. Long Jim, 227 U.S. 614 (1913) 26, 80

Stephens v. Cherokee Nation, 174 U.S. 445 (1899) 63

Squire v. Capoeman, 351 U.S. 1 (1955) 6, 27, 48, 80

Sweet v. Schock, 245 U.S. 192 (1917) 74

Taunah v. Jones, 90 F.Supp. 459 (W.D. Okla. 1950) 13, 17

Tiger v. Western Investment Co., 221 U.S. 286 (1911) 36, 64, 65, 66

United States v. Arenas, 158 F.2d 730 (9th Cir. 1946) cert. denied 331 U.S. 842 (1947) 11

United States v. Bartlett, 235 U.S. 72 (1914) 64

United States v. Benewah County, Idaho, 290 F. 268 (9th Cir. 1923) 13, 17

United States v. Chase, 245 U.S. 89 (1917) 57

United States v. Chicago, M.St.P. & P.R.Co., 282 U.S. 311 (1930) 82

United States v. Cress, 243 U.S. 316 (1917) 82

United States v. Ferry County, Washington, 39 F.Supp. 1007 (E.D.Wash. 1941) 13, 17

United States v. Ferry County, Washington, 24 F.Supp. 399 (E.D.Wash. 1938) 13, 17

United States v. Grand River Dam Authority, 363 U.S. 229 (1960) 80

United States v. Jackson, 280 U.S. 183 (1930) 63, 66, 79

United States v. Jim, 409 U.S. 80, reh.den. 409 U.S. 1118 (1972) 11, 15, 47, 57, 58, 59

United States v. Joint Traffic Assn., 171 U.S. 505 (1898) 82

United States v. Lynah, 188 U.S. 445 (1902) 82

United States v. Mazurie, — U.S. — 42 L.Ed.2d 706 (Jan. 21, 1975) 51, 52

Page

United States v. Minnesota, 113 F.2d 770 (8th Cir. 1940) 12

United States v. Minor, 114 U.S. 233 (1885) 77

United States v. Nez Perce County, 95 F.2d 232 (9th Cir. 1938) 13, 17

United States v. Payne, 264 U.S. 446 (1924)

United States v. Payne Lumber Co., 206 U.S. 467 (1907) 12

United States v. Powers, 16 F.Supp. 155 (D.Mont. 1936) 13, 17

United States v. Reynolds, 250 U.S. 106 (1918) 11

United States v. Rowell, 243 U.S. 464 (1917) ..... *passim*

United States v. Shoshone Tribe, 304 U.S. 111 (1938) 13

United States v. Southern Pacific Co., 251 U.S. 1 (1919) 77

United States v. Spaeth, 24 F.Supp. 465 (D. Mont. 1938) 13, 17

Virginia R. Co. v. System Federation No. 40, 300 U.S. 515 (1936) 82

Wallace v. Adams, 204 U.S. 415 (1907) 63

Ward v. Love County, 253 U.S. 17 (1920) 13, 17, 24, 25

Washington Securities Co. v. United States, 234 U.S. 76 (1914) 77

Weinberger v. Wiesenfeld, — U.S. —, 42 L.Ed.2d 514 (March 19, 1975) 29

Wheeler v. Montgomery, 397 U.S. 280 (1970) 29

Williams v. Johnson, 239 U.S. 414 (1915) 13, 17, 64

Williams v. Lee, 358 U.S. 217 (1959) 19, 51, 52

Wilson v. Wall, 6 Wall. 83 (1867) 14

Wong Wing v. United States, 163 U.S. 228 (1896) 82

Woodward v. DeGraffenried, 238 U.S. 284 (1915) 41, 60

Page

Worcester v. Georgia, 6 Pet. 515 (1832) 19, 80, 82
Wyoming v. United States, 255 U.S. 489 (1921) 31, 71, 73
Statutes:
Act of March 3, 1871, 16 Stat. 566 10
Act of February 8, 1887, 24 Stat. 388 ..... 9, 11, 12, 14, 36
Act of May 29, 1908, 35 Stat. 460 40
Act of June 28, 1906, 34 Stat. 539 ..... 40, 42
Act of June 30, 1919, 41 Stat. 17 ..... 40, 43
Act of June 4, 1920, 41 Stat. 751 ..... 40, 43
Act of March 3, 1921, 41 Stat. 1355 ..... 40, 43
Act of June 3, 1926, 44 Stat. 690 ..... *passim*
Act of June 18, 1934, 48 Stat. 984 ..... 14, 32
Act of May 17, 1968, 82 Stat. 121 58
Act of July 24, 1968, 82 Stat. 424 ..... 3, 4, 45, 83
18 U.S.C. 1161 51
25 U.S.C. 70 47
25 U.S.C. 398c 47
25 U.S.C. 476 ..... 50, 51
42 U.S.C. 4321 et seq. 54
Federal Regulations:
25 C.F.R. 171 ..... 52, 53
25 C.F.R. 172 53
25 C.F.R. 177 ..... 53, 54, 55
Other Authorities:
C.Kapplar, Indian Affairs: Laws and Treaties, Vol. I 2, 48
67 Cong. Rec. 9735 (1926) 33, 34, 35
67 Cong. Rec. 6522 (1926) 5, 34, 35, 81
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D.S. Otis, History of the Allotment Policy, (1934) 9

Page

Executive Order of March 19, 1900 2
Executive Order of November 26, 1884 ..... 2, 48
F. Cohen, Handbook of Federal Indian Law (1940) .... *passim*
H.Rep.No. 1292 90th Cong. 2nd Sess. 4 (1968) 45
J. Kinney, A Continent Lost—A Civilization Won (1937) 9
23 Opps.Atty.Gen. 528 53
Sen.Rep.No. 638, 69th Cong. 1st Sess. (1926) 33
84-1314 R.C.M. (1947) 48

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-145

THE NORTHERN CHEYENNE TRIBE,

Petitioner,

v.

WILLIAM HOLLOWBREAST, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS ELVA L. LITTLECHIEF WILLIAMSON AND JAMES BOWEN

ISSUES PRESENTED

1. Did the Northern Cheyenne Indian allottees receive a vested, or constitutionally protected interest in the minerals underlying their allotment lands from the following language of the Northern Cheyenne Allotment Act: "That at the expiration of fifty years . . . minerals . . . and other natural deposits of said allotment

shall become the property of the respective allottees or their heirs."?[1]

2. May Congress divest such individual interest in allotment land under its "plenary" power over Indian tribes?

STATEMENT OF THE CASE

While the Northern Cheyenne Indian Reservation was created by Executive Order in 1884,[2] this reservation was not the object of any substantive legislation until 1926. On June 3, 1926 Congress passed an allotment act,[3] subdividing the communally held tribal property into parcels for individual Indian ownership. This act disposed of the minerals as follows:

> "Sec. 3. That the timber, coal or other minerals including oil, gas, and other natural deposits, on said reservation are hereby reserved for the benefit of the tribe and may be leased with the consent of the Indian Council under such rules and regulations as the Secretary of the Interior may prescribe: *Provided,* That *at the expiration of fifty years* from the date of the approval of this Act the coal and other minerals, including oil, gas, and other natural deposits, of said allotment *shall become the property of the respective allottees or their heirs: Provided further,* That the unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians. Act of June 3, 1926, 44 Stat. 690. (Emphasis added)

[1]Act of June 3, 1926, 44 Stat. 690.

[2]The Northern Cheyenne Indian Reservation was set apart by two executive orders. The first was by President Chester A. Arthur on November 26, 1884, C. Kapplar *Indian Affairs: Laws and Treaties,* Vol. I at 860, and later by President William McKinley on March 19, 1900, C. Kapplar *Indian Affairs: Laws and Treaties,* Vol. I at 860-61.

[3]Act of June 3, 1926, 44 Stat. 690.

Thus, the minerals were under tribal control for a term of fifty years, such possessory control then passing to the allottees. This section gave the Indian allottees a vested remainder type interest in the minerals underlying their individual allotments.

However, in 1968, just eight years before this mineral interest would become possessory, Congress attempted to divest the allottees' interest in the minerals by providing:

> "Sec. 3.(a) The coal or other minerals, including oil, gas, and other natural deposits, on said reservation are *hereby reserved in perpetuity for the benefit of the tribe* and may be leased with the consent of the Indian council for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a-f), under such rules, regulations, and conditions, as the Secretary of the Interior may prescribe." Act of July 24, 1968, 82 Stat. 424. (Emphasis added)

Due to Congressional doubt concerning the constitutionality of such a taking[4] the 1968 amendment specifically required the tribal council to bring this suit

[4]Congress was evidently concerned about the possibility of an Indian Claims Commission judgment for the value of the minerals divested. H.R.Rep. No. 1292 90th Cong. 2nd Sess. 4 (1968).

to quiet title in the mineral rights affected.[5] If the tribal council wins, the 1968 amendment remains operative. However, if the allottees prevail, the 1968 amendment automatically becomes inoperative.[6] Hence, whether the 1968 amendment shall divest the allottees in favor of this tribal council and the State of Montana[7] was left up to the Courts.

---

[5]"Sec. 2. The Northern Cheyenne Tribe is authorized to commence in the United States District Court for the District of Montana an action against the allottees who received allotments pursuant to the Act of June 3, 1926, as amended, their heirs or devisees, either individually or as a class, *to determine whether* under the provisions of the Act of June 3, 1926, as amended, the allottees, their heirs or devisees, have *received a vested property right in the minerals which is protected by the fifth amendment.* The United States District Court for the District of Montana shall have jurisdiction to hear and determine the action and an appeal from its judgment may be taken as provided by law. *If the court determines that the allottees, their heirs or devisees, have a vested interest in the minerals which is protected by the fifth amendment, or if the tribe does not commence an action as here authorized within two years from the date of this Act, the first section of this Act shall cease to have any force or effect,* and the provisions of section 3 of the Act of June 3, 1926, as amended by the Acts of July 24, 1947, and September 21, 1961, shall thereupon be carried out as fully as if section 3 had not been amended by this Act." Act of July 24, 1968, 82 Stat. 424. (Emphasis added).

[6]Sec. 2 of the 1968 amendment specifically conditions transfer of the remainder interest in the minerals upon the tribal council's *successful* prosecution of this suit. See n.5.

[7]See Sec. III infra, which explains how the 1968 amendment accomplishes a substantial taking for non-Indian purposes in favor of the State of Montana.

As required by the 1968 amendment, the tribal council initiated this suit against its Indian constituents to divest their mineral interests. The trial court ruled in favor of the tribal council.[8] However, the Ninth Circuit reversed[9] holding the allottees acquired a vested interest in the minerals due to the "unconditional, non-contingent grant of these deposits to the allottees".[10] This appeal followed the Ninth Circuit's decision.

SUMMARY OF THE ARGUMENT

The Respondents claim a property right in the minerals underlying their allotment lands through the Northern Cheyenne Allotment Act. This act was passed to implement the allotment system on the Northern Cheyenne Indian Reservation. The allotment system was instituted for the avowed purpose of vesting property rights (ultimately fee title) in individual Indians. Consequently, the allotment rights at issue should be viewed in the context of a "pro-vesting" statutory purpose.

The legislative history of the 1926 allotment act depicts a Congressional design to presently vest—but delay possession—of the minerals at issue in the allottees. Indeed Congress rebelled from the proposed allotment of "surface rights only"[11] by granting a

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[8]Northern Cheyenne Tribe v. Hollowbreast, et al., 349 F.Supp. 1302 (D.C. Mont. 1972).

[9]Northern Cheyenne Tribe v. Northern Defendant Class of Allottees, Heirs and Devisees, 505 F.2d 268 271 (9th Cir. 1974).

[10]505 F.2d at 271.

[11]67 Cong. Rec. 6522 (1926).

remainder type interest to the allottees in, "unequivocal and non-contingent"[12] terms. In addition, Congress omitted from the mineral grant its often used proviso ("unless otherwise provided by Congress") retaining the power to extend tribal ownership. The deletion of this proviso, used in allotting most Montana reservations, further indicates a Congressional design to presently vest the allottees' mineral interest.

While Congress does have a broad "plenary" power over tribal property, Congress' powers are subject to the ordinary constitutional limitations, i.e., due process, when it affects the property rights of individual Indians. This limitation was specifically set forth in *Choate v. Trapp*, 224 U.S. 665 (1912). In the instant case, as in *Choate v. Trapp*, the Congressional divestment of individual Indians' rights in their allotment lands is violative of due process.

Congress clearly exceeded its plenary powers by passing the 1968 amendment because this amendment accomplishes a substantial taking for non-Indian purposes. If the coal is tribally owned a federal statute allows states to tax the coal. *Montana imposes a 30% tax on such coal!* Montana is under no obligation to use this revenue to benefit the Northern Cheyenne people. Hence tribal ownership will cause a 30% depletion of the Northern Cheyenne mineral estate to non-Indian use. However, if the allottees own the coal, it will be tax exempt according to *Squire v. Capoeman*, 351 U.S. 1 (1955). Consequently, only through allottees' ownership may the Northern Cheyenne mineral estate remain devoted fully to the benefit of the Northern Cheyenne people.

[12]These are the terms describing the grant of minerals from Judge Choy's decision below. Northern Cheyenne Tribe v. Northern Cheyenne Defendant Class of Allottees, Heirs and Devisees, 505 F.2d 268, 271 (9th Cir. 1974).

Finally Petitioner cites and quotes at length from numerous cases supporting Congress' plenary power over Indian affairs. However, the quotes or cases cited do not actually deal with individual Indian property rights. Hence Petitioner's authority does not free Congress from the dictates of due process governing the legislation and property rights, here at issue.

Consequently, the 1968 amendment's attempt to divest the allottees interest in the coal underlying their allotment land is unconstitutional as a taking without compensation.

ARGUMENT

I.

THE NINTH CIRCUIT DID NOT ERR BY RE-AFFIRMING THE PRINCIPLES SET FORTH IN CHOATE V. TRAPP APPLYING DUE PROCESS LIMITS TO CONGRESS' OTHERWISE PLENARY POWER OVER INDIAN AFFAIRS.

A. The Background Of The Allotment System Clarifies The Nature Of The Rights Involved.

This brief explanation of the Indian land allotment system and the type estates it produced is particularly important to a proper understanding of the rights here at issue. This is because the estates produced by the allotment system are peculiar to this narrow area of

federal regulation. Also Petitioner's claims asserting Congress' broad plenary power to re-allocate Indian property[13] rest upon a failure to properly *distinguish between Congress' power over individual Indians' property and Congress' power over communally held tribal property. This distinction is the key to resolving this case.*

Prior to their settlement on reservations, the Indians of the North Plains knew no exclusive property rights in real property. Rather, they viewed land as being for the communal, non-exclusive use and occupancy of its inhabitants.[14] When these people were settled on reservations, they continued to recognize the nonexclusive use and occupancy of land as a proper mode of tenure.

During the late 1800's it became apparent that most Indian reservations were being surrounded by the non-Indian culture. This presented several prevalent problems. The resulting increase of Indian/non-Indian contact was a source of constant friction due to the clashing cultural values. Also, the Indians were generally not accustomed to farming so they were not self-sufficient. These problems aroused Congressional concern as to how the large number of Indians on reservations might adapt to the ways of the non-Indian society they must inevitably live with.

The allotment system was developed as the plan to encourage Indians to become productive members of civilization by converting the Indian to the way of the white man.[15] Noting individual land ownership was

[13]Petitioner's Brief at Sec. 2-3.

[14]F. Cohen, *Handbook of Federal Indian Law*, 208 (1940).

[15]F. Cohen, *Handbook of Federal Indian Law*, 206-210 (1940).

essential to this cultural transition,[16] Congress implemented a system dividing tribal lands into parcels for ownership by individual Indians. This was the allotment system.[17]

The basic framework for the allotment system was set forth in the General Allotment Act (hereafter G.A.A.).[18] The G.A.A. was passed as a unilateral act of

[16]Commenting on Congress' Legislative motives, Mr. Cohen wrote: "That the leading proponents of allotment were inspired by the highest motives seems conclusively true. A Member of Congress, speaking on the Dawes Bill in 1886 said, 'It has * * * the endorsement of the Indian rights associations throughout the country, and of the best sentiment of the land.' The supreme aim of the friends of the Indian was to substitute white civilization for his tribal culture, and they *shrewdly sensed that the difference in the concepts of property was fundamental in the contrast between the two ways of life.* That the white man's way was good and the Indian's way was bad, all agreed. So, on the one hand, allotment was counted on to break up tribal life. This blessing was dwelt upon at length." F. Cohen, *Handbook of Federal Indian Law*, 208 (1940). (Emphasis added).

This Court described the transition of title under the allotment system as follows: "For a long period Congress pursued the policy of imposing as rapidly as possible, our system of individual land tenure on the Indian. To this end tribal or *communal land holdings of the Indians were superceded by allotment to individuals*, who were protected against improvidence by restrictions on alienation." Arenas v. United States, 322 U.S. 419, 420-21 (1944). (Emphasis added).

[17]For further accounts on the development of the allotment system see: J. Kinney, *A Continent Lost–A Civilization Won* (1937); D.S. Otis, *History of the Allotment Policy* (1934) found at the Hearings, Committee on Ind. Aff. 73rd Cong., 2d Session on H.R. 7902 (1934).

[18]Act of February 8, 1887, 24 Stat. 388.

Congress and was not negotiated with the tribes. Under the authority of the G.A.A. and other similar acts, several commissions were dispatched to the various reservations to implement the allotment system. These commissions negotiated the terms of allotment according to the demands presented by the size of the reservation, the land's potential for farming or ranching, the population of the tribe, the disposition of mineral resources, etc. Once the tribes agreed to the allotment terms, the agreement was then passed upon by Congress. Pursuant to such Congressional action, an act was passed implementing the allotment system on each reservation.[19]

In 1871 Congress shifted its method of conducting Indian affairs from treaty negotiations to unilateral regulation by statute.[20] After this transition, allotment acts were passed by Congress without securing the agreement of the tribe. The 1926 Northern Cheyenne Allotment Act, here at issue, was passed without such tribal agreement.

Hence the allotment system set forth a scheme for the transition of Indian lands from tribal ownership to ownership by individual Indians. This transition had several phases.[21] In each successive phase, the allottee

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[19]See *Choate v. Trapp*, 224 U.S. 665 (1912) for a description of this process.

[20]Act of March 3, 1871, 16 Stat. 566, codified at 25 U.S.C. 71.

[21]These allotment acts typically provided for the reservation to be surveyed into tracts. Enrolled members of the tribe could select a parcel as their allotment. Upon approval of such allotment by the Secretary of the Interior a trust patent issued on said allotment, and upon the expiration of the 25 year restraint on alienation, the Indian could receive a fee patent on the land.

acquired more complete title until finally he could take a fee patent.

So long as the land was *tribal* land, the individual Indian had no vested right in such land.[22] However, once the individual Indian chose and filed his application for the allotment, the land was removed from tribal ownership.[23] The *allottee's rights in the land vested when the allottee selected the parcel and filed a proper application.*[24] Once the application was approved, the trust patent issued. The period governing the restraint on alienation commenced upon issuance of the trust patent.[25] Under the trust patent the United States held legal title as guardian of the allottee while the allottee held equitable title to the land.[26] The

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[22]United States v. Jim, 409 U.S. 80 reh.den. 409 U.S. 1118 (1972); Chippewa Indians v. United States, 307 U.S. 1 (1938); Chase Jr. v. United States, 256 U.S. 1 (1921); Nadeau v. Union Pacific Railroad, 253 U.S. 442 (1920); Sizemore v. Brady, 235 U.S. 441 (1914); Gritts v. Fisher, 224 U.S. 640 (1912); also see F. Cohen, *Handbook of Federal Indian Law*, 138-84 (1940).

[23]Raymond Bear Hill, 52 I.D. 688 (1929).

[24]The Indian's rights in his allotment prior to issuance of the initial patent are recognized in *Arenas v. United States*, 322 U.S. 419 (1944); *Sizemore v. Brady*, 235 U.S. 441 (1914); *Ballinger v. United States*, 216 U.S. 240 (1909); *Hy-Yu-Tse-Mil-Kin v. Smith*, 194 U.S. 401 (1904); *Elwood v. Flannigan*, 14 Otto 562 (1882); *Crews v. Burcham*, 1 Black 352 (1862); *Doe v. Wilson*, 23 How 457 (1859); *United States v. Arenas*, 158 F.2d 730 (9th Cir. 1946) cert. denied 331 U.S. 842 (1947); *Leecy v. United States*, 190 F. 289 (8th Cir. 1911); *Pka-O-Wah-Ash-Kum v. Sorin*, 8 F. 740 (C.C.N.D.Ill. 1881); *Rights of Indians to Allotments In San Juan County, Utah*, 57 I.D. 547 (1942); *Allotment Sections on the Fort Belknap Indian Reservation*, 55 I.D. 295 (1935) and *Raymond Bear Hill*, 52 I.D. 688 (1929).

[25]United States v. Reynolds, 250 U.S. 106 (1918).

[26]Act of Feb. 8, 1887, 24 Stat. 388(5); Payne v. New Mexico, 255 U.S. 367 (1921); Rights of Indians to Allotments in San Juan County, Utah, 57 I.D. 547 (1942).

allottee's equitable title is regarded as fee title[27] subject to a restraint on alienation[28] enforced by the government.[29] The *allottee's title under a trust patent was also predominant over any interest the tribe,*[30] the federal government[31] or other individuals[32] may claim in such land. Such rights *including minerals*[33] are specifically *protected by the Constitution.*[34] Ownership

[27]Arenas v. United States, 322 U.S. 419, 421 (1944); Mott v. United States, 283 U.S. 747, 749 (1931); United States v. Payne Lumber Co., 206 U.S. 467, 473 (1907); United States v. Minnesota, 113 F.2d 770, 773 (8th Cir. 1940); and Fish v. Wise, 52 F.2d 544 (10th Cir. 1931) cert. denied 282 U.S. 903 (1931).

[28]Act of February 8, 1887, 24 Stat. 388.

[29]Heckman v. United States, 224 U.S. 413 (1912).

[30]In *Fish v. Wise,* 52 F.2d 544 (10th Cir. 1931) cert. denied, 282 U.S. 903 (1931) the Tenth Circuit specifically *rejected a tribe's attempt to reallocate the mineral estate of Indian allottees.* See also *Leecy v. United States,* 190 F. 289 (8th Cir. 1911).

[31]Arenas v. United States, 322 U.S. 419 (1944); Choate v. Trapp, 224 U.S. 665 (1912); Gleason v. Wood, 224 U.S. 679 (1912); English v. Richardson, 224 U.S. 680 (1912); Mullen v. United States, 224 U.S. 488 (1912); Ballinger v. United States, 216 U.S. 240 (1909); Leecy v. United States, 190 F. 289 (8th Cir. 1911); Rights of Indians to Allotment in San Juan County, Utah, 57 I.D. 547 (1929); Allotment Sections on the Fort Belknap Indian Reservation, 55 I.D. 295 (1935); and Raymond Bear Hill, 52 I.D. 688 (1929).

[32]Hy-Yu-Tse-Mil-Kin v. Smith, 194 U.S. 401 (1904); Jones v. Meehan, 175 U.S. 1 (1899); Sizemore v. Brady, 235. U.S. 441 (1914); and Mott v. United States, 283 U.S. 747 (1931).

[33]Mott v. United States, 283 U.S. 747 (1931).

[34]Among the cases *expressly* proclaiming Constitutional protection of individual Indian's property rights are: *Supreme Court*–Oklahoma Tax Comm'n. v. United States, 319 U.S. 598, 603 (1943); County of Mahnomen v. United States, 319 U.S. 474, 476 (1943); Mott v. United States, 283 U.S. 747, 752

of minerals will be inferred to pass to Indians upon silence of the statute.[35] Federal restrictions on such

(1931); Carpenter v. Shaw, 280 U.S. 363, 365, 366 (1929); Sizemore v. Brady, 235 U.S. 441, 449 (1914); Ward v. Love County, 253 U.S. 17, 20, 21 (1919); Williams v. Johnson, 239 U.S. 414, 419 (1915); Choate v. Trapp, 224 U.S. 665 (1912); Gleason v. Wood, 224 U.S. 679 (1912); English v. Richardson, 224 U.S. 680 (1912); Jones v. Meehan, 175 U.S. 1 (1899)–*Court of Appeals*–United States v. Benewah County, Idaho, 290 F. 268 (9th Cir. 1923); Kirkwood v. Arenas, 243 F.2d 863, 869 (9th Cir. 1957); Board of County Commissioners v. United States, 152 F.2d 540, 542 (10th Cir. 1945); Board of County Commissioners v. Seben, 130 F.2d 663, 668 (10th Cir. 1941); Landman v. Comm'n Internal Revenue Service, 123 F.2d 787, 790 (10th Cir. 1941); Bryan County, Oklahoma v. United States, 123 F.2d 782, 784 (10th Cir. 1941); Glacier County, Montana v. United States, 99 F.2d 733, 734 (9th Cir. 1938) (does not cite *Choate,* but states the general proposition as to tax exemptions and vested rights, and cites a previous Ninth Circuit case, United States v. Nez Perce County, 95 F.2d 232 (9th Cir. 1938) in which *Choate* is cited); United States v. Nez Perce County, 95 F.2d 232 (9th Cir. 1938); Board of Commissioners of Tulsa County, Oklahoma v. United States, 94 F.2d 450, 451 (10th Cir. 1938); Morrow v. United States, 243 F. 854, 856 (8th Cir. 1917)–*District Court, Court of Claims*–Agua Caliente Band of Mission Indians v. County of Riverside, 306 F.Supp., 279, 284 (C.D. Calif. 1969); Choctaw Nation v. United States, 100 F.Supp. 318, 320 (Ct. Cl. 1951); Taunah v. Jones, 90 F.Supp. 459, 463 (W.D. Okla. 1950); United States v. Ferry County, Washington, 39 F.Supp. 1007, 1010, 1011, 1012 (E.D. Wash. 1941); United States v. Spaeth, 24 F.Supp. 465, 467 (D. Minn. 1938); United States v. Ferry County, Washington, 24 F.Supp. 399, 400 (E.D.Wash. 1938); McIntire v. United States, 22 F.Supp. 316, 320 (D. Mont. 1936); United States v. Powers, 16 F.Supp. 155, 162 (D. Mont. 1936).

[35]United States v. Shoshone Tribe, 304 U.D. 111 (1938).

land will not be readily inferred but must be specifically authorized prior to the vesting.[36]

However, the Indian, as a ward of the federal government, was subject to certain restrictions. Consequently, the allottee could not alienate the land so long as the federal government held the land so long as the federal government held the land in trust. Once the period for holding the land in trust had expired, a patent in fee, free of all encumbrance, could be issued to the allottee or his heirs.[37]

Not all reservation land was allotted. Some was sold to non-Indian homesteaders and some remained under tribal ownership. In 1934 the allotment of tribal land ceased.[38]

Consequently, there are presently several types of ownership of reservation land: land which had been allotted and is in individual Indian ownership; land owned by non-Indian individuals and; land which is not allotted and remains in tribal ownership.

Thus, *commonly held tribal land is a very different estate than the individually owned Indian allotments (here at issue).*[39]

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[36]Mullen v. United States, 224 U.S. 448 (1912); Wilson v. Wall, 6 Wall. 83 (1867); Doe v. Wilson, 23 How. 457 (1859); Adams v. Osage Tribe, 59 F.2d 653 (10th Cir. 1932); Leecy v. United States, 190 F. 289 (8th Cir. 1911); and F. Cohen, *Handbook of Federal Indian Law*, 97 (1940).

[37]Act of February 8, 1887, 24 Stat. 388 (5); 25 C.F.R. 121.

[38]Act of June 18, 1934, 48 Stat. 984.

[39]"Reservation land is divided into two classes: land allotted to individual Indian for the use and benefit of the allottee; and common tribal land used for the benefit of the entire community". C.I.R. v. Walker 326 F.2d 261, 262 (9th Cir. 1964).

As a result, Congress may not indiscriminantly exercise its control over reservation lands. Rather, the extent to which Congress may exercise control over such land depends on the type ownership of the land. Congress may re-allocate benefits of *tribal* land within the tribe as it pleases[40] but may only manage *individual property (here at issue) subject to the constitutionally protected property rights of the individual owners.*[41]

B. The Constitutional Protection Of Respondents' Interest In The Mineral Estate Is Established In Choate v. Trapp.

(1) Choate v. Trapp And Gritts v. Fisher When Read Together Explain But Limit Congress' Plenary Power Over Indians By Providing Due Process Protection Of Individual Indian Property Rights.

While Congress does possess a broad plenary power when dealing with Indians collectively, as tribal bodies, such plenary power is restricted by ordinary constitutional limitations when governing the rights of Indians as individuals and as citizens.[42] The extent of and

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[40]The reason for this being that no individual's rights have vested to interfere with such re-allocation. See *United States v. Jim*, 409 U.S. 80 reh. den. 409 U.S. 1118 (1972); *Gritts v. Fisher*, 224 U.S. 640 (1912).

[41]Choate v. Trapp, 244 U.S. 665 (1912). English v. Richardson, 224 U.S. 680 (1912). Also see cases cited in footnote 34.

[42]Among the cases *expressly* proclaiming Constitutional protection of individual Indian's property rights are: *Supreme Court*–Oklahoma Tax Comm'n. v. United States, 319 U.S. 598, 603 (1943); County of Mahnomen v. United States, 319 U.S. 474, 476 (1943); Mott v. United States, 283 U.S. 747, 752

limitation of this "plenary" power was set forth in the landmark cases of *Choate v. Trapp*, 224 U.S. 665 (1912) and *Gritts v. Fisher*, 224 U.S. 640 (1912). Analysis of these two opinions proves the Ninth Circuit's decisic below correct.

While *Choate v. Trapp* and *Gritts v. Fisher* were not companion cases as such, it is most informative to read the two decisions together. Both cases were argued within a two month period and both decisions were announced the same day. Both involved rights of individual Indians, *Gritts* in tribal property, and *Choate* in individually owned allotment land. Both cases were on the Justices' minds when the cases were decided and when the decisions were being drafted. And both decisions were specifically drafted to acknowledge and compliment the ruling of the other.

Choate v. Trapp is particularly important. Since both *Choate* and the instant case involve individual Indians' property rights in trust allotments *Choate* should control disposition of the respondent/allottees' rights in the mineral estate. Indeed, this was the result in the Ninth Circuit's decision below.

In *Choate*, members of the Choctaw and Chickasaw Nations received individual trust allotments pursuant to the Curtis Act. The Curtis Act also provided the lands would be tax exempt for twenty-five years. A later federal statute repealed this tax exemption, before expiration of the twenty-five year period. In *Choate* this Court struck down the tax repealing statute. The rationale was the tax exemption, as a property right in the allotment, was—immune from uncompensated divestment according to due process.

The *Choate* decision is controlling for several reasons. *First Choate* protected Indians' rights in their individually owned property. The Court recognized:

> "There have been comparatively few cases which discuss the legislative power over private property held by Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His *private rights* are secured and enforced *to the same extent in the same way as other residents or citizens of the United States.*" Choate v. Trapp, 224 U.S. at 677. (Emphasis added)

(1931); Carpenter v. Shaw, 280 U.S. 363, 365, 366 (1929); Sizemore v. Brady, 235 U.S. 441, 449 (1914); Ward v. Love County, 253 U.S. 17, 20, 21 (1919); Williams v Johnson, 239 U.S. 414, 419 (1915); Choate v. Trapp, 224 U.S. 665 (1912); Gleason v. Wood, 224 U.S. 679 (1912); English v. Richardson, 224 U.S. 680 (1912); Jones v. Meehan, 175 U.S. 1 (1899)–*Court of Appeals*–United States v. Benewah County, Idaho, 290 F. 268 (9th Cir. 1923); Kirkwood v. Arenas, 243 F.2d 863, 869 (9th Cir. 1957); Board of County Commissioners v. United States, 152 F.2d 540, 542 (10th Cir. 1945); Board of County Commissioners v. Seben, 130 F.2d 663, 668 (10th Cir. 1941); Landman v. Comm'n Internal Revenue Service, 123 F.2d 787, 790 (10th Cir. 1941); Bryan County, Oklahoma v. United States, 123 F.2d 782, 784 (10th Cir. 1941); Glacier County, Montana v. United States, 99 F.2d 733, 734 (9th Cir. 1938) (does not cite *Choate*, but states the general proposition as to tax exemptions and vested rights, and cites a previous Ninth Circuit case, United States v. Nez Perce County, 95 F.2d 232 (9th Cir. 1938) in which *Choate* is cited); United States v. Nez Perce County, 95 F.2d 232 (9th Cir. 1938); Board of Commissioners of Tulsa County, Oklahoma v. United States, 94 F.2d 450, 451 (10th Cir. 1938); Morrow v. United States, 243 F. 854, 856 (8th Cir. 1917)–*District Court, Court of Claims*–Agua Caliente Band of Mission Indians v. County of Riverside, 306 F.Supp., 279, 284 (C.D. Calif. 1969); Choctaw Nation v. United States, 100 F.Supp. 318, 320 (Ct. Cl. 1951); Taunah v. Jones, 90 F.Supp. 459, 463 (W.D. Okla. 1950); United States v. Ferry County, Washington, 39 F.Supp. 1007, 1010, 1011, 1012 (E.D. Wash. 1941); United States v. Spaeth, 24 F.Supp. 465, 467 (D. Minn. 1938); United States v. Ferry County, Washington, 24 F.Supp. 399, 400 (E.D.Wash. 1938); McIntire v. United States, 22 F.Supp. 316, 320 (D. Mont. 1936); United States v. Powers, 16 F.Supp. 155, 162 (D. Mont. 1936).

Such property rights are constitutionally protected from divestment including diminishment or "re-allocation."[43]

> "Under the provisions of the Fifth Amendment there was no more power to deprive him of the exemption than other rights in the property. No statute would have been valid which reduced his fee to a life estate or attempted to take from him ten acres, or fifty acres, or the timber growing on the land . . . *It is conceded that no right which was actually conferred upon the Indian can be arbitrarily abrogated by statute.*" Choate v. Trapp, 224 U.S. at 674. (Emphasis added)

Thus rights of individual Indians in their individually owned property is protected by due process.

The *second* important point in *Choate* is the type estate protected.

The rights in *Choate* were the *rights of individual Indian allottees in their land held under TRUST ALLOTMENTS.*[44] This is the *same interest and the SAME TYPE ESTATE presented by the Respondent/ Allottees in the case at bar.* Consequently, *Choate* compels a recognition of the constitutional protection afforded the very estates now before this Court. This in

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[43]The fact that diminishment, hence "re-allocation" of individual property is prohibited is particularly important in light of the trial court's attaching considerable importance to this just being a "re-allocation" somehow removing the divestment problem. See *Northern Cheyenne Tribe v. Hollowbreast,* 349 F.Supp. 1302, 1311 (D. Mont. 1972).

[44]Only under trust allotments are restraints on alienation imposed (See n. 28). The later statute allowing taxation also attempted to remove this restraint. Since the rights must have vested prior to passage of this later statute, such rights must have vested in trust allotments.

turn compels affirmance of the Ninth Circuit's decision below.

The *third* important point in *Choate v. Trapp* is that *both Choate and the instant case* involved *divesting by a federal statute.* Thus *Choate* protects against action by the federal government. This is important because only the federal government has the broad plenary powers resulting from its guardianship relation to the Indians.[45]

Consequently, *Choate* specifically limits Congress' otherwise broad plenary powers by attaching due process requisites to allotment statutes. This point was emphasized by *Choate's* rejecting Petitioner's "plenary" power argument when weighed against the constitutional rights of Indian individuals.

> ". . . . it was said that incompetent persons, though citizens, may not have the full right to control their property and there was nothing in citizenship incompatible with guardianship, ... But there *was no indication that the power of wardship conferred authority on Congress to lessen any of the rights of property which have been vested in the individual Indian* by prior laws or contracts. Such rights are *protected from repeal by the provisions of the Fifth Amendment.*" Choate v. Trapp, 224 U.S. at 578. (emphasis added)

Thus, *Choate* specifically limited the plenary power upon which the Petitioner relies.

The *Choate* decision and the Ninth Circuit's decision below parallel each other in many respects: both

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[45]*Worcester v. Georgia,* 6 Pet. 515 (1832) held the federal government is guardian of the Indians, such guardianship being immune from interference by the states. See also *Williams v. Lee,* 358 U.S. 217 (1959), and *McClanahan v. State Tax Commission of Arizona,* 411 U.S. 164 (1973).

involve individual Indians' property rights; both involve property rights in trust allotments; both affirm the existence and protection of such rights; both reject attempts to divest such rights by a later federal statute; and both limit the federal government's plenary powers as guardian of the Indians private property. In the face of these parallels *Choate* clearly controls the disposition of the instant case. Consequently, the Ninth Circuit's decision below is correct.

Gritts v. Fisher, 224 U.S. 640 (1912) compliments *Choate* in defining the extent of individual Indians' rights in tribal property and conversely in defining the extent of Congress plenary power to manipulate such property.

In *Gritts* enrollment in the tribal rolls closed on a given date. Only those enrolled prior to that date were legally members of the tribe. The tribal land was to be allotted among the enrolled members. The left over tribal land was to be sold to homesteaders with the proceeds to be distributed among the enrolled members. A later statute re-opened the tribal rolls to permit additional enrollment. The original enrollees sued to prevent diminishment of their share of funds from liquidation of the *tribal property*. Hence, the issue in *Gritts* was: Did the original enrollees have a vested right in the proceeds from *tribal* property? This Court answered, "NO". While an individual Indian holds no vested right in tribal property, the *Gritts* decision carefully pointed out it deals *only with tribal property*, not with individual allotments.[46] In fact the *Gritts*

[46]"It is not proposed to disturb the individual allotments. . . ." Gritts v. Fisher, 224 U.S. at 647. And again: "As has been indicated their individual allotments are not affected". Id. at 648.

decision expressly *disclaimed any right to re-allocate individual property*, in recognition of the *Choate* decision.

> ". . . It is conceded, and properly so, that the latter *legislation is valid and controlling unless it impairs or destroys rights which the act of 1902 vested* in members living September 1, 1902, and enrolled under that act. *As has* been indicated, *their individual allotments are not affected.*" Gritts v. Fisher, 244 U.S. 640, 648 (1912). (emphasis added)

Similarly, the *Choate* decision expressly recognized the *Gritts* holding[47] denying individual rights in tribal property.

In conclusion *Gritts* announced Congress' plenary power over *tribal* property but specifically limited such plenary power to tribal property.

In conclusion, *Choate* recognized vested rights in individually owned allotments while *Gritts* gave Congress plenary power over tribal property. Since *Choate* and *Gritts* dealt with different types of estates, they do not contradict each other. Instead both *Choate* and *Gritts* specifically acknowledge the holding of the other. In so doing, these opinions compliment one another, recognizing Congress' plenary power over tribal property but restricting such power when it prejudices individual property rights. Understanding this limitation on Congress' plenary power is crucial in examining the allotment rights here at issue.

[47]*Choate v. Trapp*, states "The individual Indian has *no* title or enforceable right in tribal property." 224 U.S. at 671.

(2) The Decision In Choate v. Trapp Is Based On Statutory, Not Contractual Rights.

Petitioner claims *Choate v. Trapp*, deals only with contract rights, hence is inapplicable to the rights at issue.[48] While the dicta of a few decisions may misread *Choate* in this respect, this "contract right" interpretation of *Choate* is rejected by:

The specific language of *Choate v. Trapp;* The specific language of *Gritts v. Fisher;* Substantial case law following the *Choate* decision;

Interpretation by the leading scholar in the field, and;

The expanded set of interests currently protected by due process.

(a) The Tribal "Contract" Rights Theory Of Choate v. Trapp Is Rejected By The Specific Language Of The Choate Decision.

In *Choate* the agreement or "contract" between the government and tribe was the "Atoka agreement". Petitioner claims the Atoka agreement was the source of the allottees' rights in *Choate*. The Curtis Act was the allotment act authorizing the allotments involved in *Choate*. Respondent submits the Curtis Act rather than the Atoka agreement was the source of the rights in *Choate*. In support of this claim, please note that the language of the *Choate* decision specifically disclaims

[48]See Petitioner's Brief at Sec. 3. Since the Northern Cheyenne Allotment Act was not based on an agreement with the tribe, Petitioner assumes the rights present in *Choate v. Trapp* are not applicable to the instant case.

any reliance on any "contract" rights of the Atoka agreement. The Court stated:

> "The *question* in this case, therefore, is *not whether the plaintiffs were parties to the Atoka Agreement, but whether* they had not *acquired rights under the Curtis Act which are now protected by the Constitution of the United States.*" Choate v. Trapp, 224 U.S. at 671. (Emphasis added)

This quote spells out that contract rights (the Atoka agreement) were not at issue. Rather, statutory based property rights (the Curtis Act) were at issue. Hence, the *Choate* decision itself conclusively rejects the "contract" theory submitted by Petitioner. Also other language in the *Choate* decision re-affirms the allotment act as the source of the allottee's rights.[49]

While there is language in *Choate* analogizing application for an allotment to the contractual process, 224 U.S. at 672, this explanation explains the *statute* as the offer, and application for the allotment, as acceptance. The Atoka agreement is not part of this contractual analogy. However, such contract discussions must be interpreted only as analogy, not as the basis for allotment rights.

[49]For instance: "Those who signed the patent could not convey more *rights* than they were *granted by that part of the Curtis Act*...." 224 U.S. at 673 (emphasis added). And; "The patent issued in *pursuance of those statutes gave the Indian as good a title* to the exemption as it did to the land itself." 224 U.S. at 673-74. (Emphasis added).

(b) Petitioner's Tribal "Contract" Rights Theory Of Choate v. Trapp Is Rejected By the Express Language Of Gritts v. Fisher.

As mentioned earlier, *Gritts v. Fisher* was the companion decision of *Choate v. Trapp*. Apparently the "contract" theory of Indian rights was argued in both cases. The *Gritts* decision rejected the "contract" theory by noting:

> "The difficulty with the appellant's contention is that it *treats the act of 1902 as a contract, when 'it is only an act of Congress and can have no greater effect.'* " Gritts v. Fisher, 224 U.S. at 648. (emphasis added)

How could this Court have made its decision any clearer? Manifestly, the statute rather than the tribal agreement must serve as the basis for any individual rights. This is squarely at odds with Petitioner's "contract" theory.

(c) Petitioner's Tribal "Contract" Theory Of Choate v. Trapp Is Rejected By Substantial Case Law Following Choate.

Substantial case law has both affirmed the statutory nature of the rights in *Choate* and rejected Petitioner's tribal "contract" theory of such rights. Initially, *English v. Richardson*, 224 U.S. 680; *Ward v. Love County*, 253 U.S. 17 (1920) and *Carpenter v. Shaw*, 280 U.S. 363 (1929) were all decided by this Court, all involved the very same statutory tax exemption as *Choate* and all expressly interpreted *Choate* as recognizing statutory based property rights.

In *English v. Richardson*, this Court stated: "The right to the plaintiff to the exemption *granted by Congress* is protected by the Constitution on principles stated and applied in *Choate v. Trapp.*" 224 U.S. at 681. (Emphasis added). The fact that this Court acknowledged these rights as "granted by Congress" indicates these rights were statutory rights.

Again in *Ward v. Love County*, this Court stated:

> "This was settled in *Choate v. Trapp* . . . and was also settled in those cases that the exemption was a vested property right *arising out of a law of Congress and protected by the Constitution* of the United States . . . through the pending suits and otherwise they were objecting and protesting taxation of their lands which had *been forbidden by a law of Congress.*" 253 U.S. at 20, 23. (Emphasis added)

And still again in *Carpenter v. Shaw*, this Court referred to *Choate* stating:

> "It was there held that the provision for the exemption conferred upon the allottees' *property rights* which were within the protection of the Fifth Amendment and hence it was not subject to repeal by later Congressional legislation; . . . ." 280 U.S. at 365-66 (1929). (Emphasis added)

Thus, when this Court has specifically referred to the source of the rights in *Choate*, such rights have been repeatedly characterized as statutory property rights.

In addition to *Choate* and *Gritts* numerous cases have rejected Petitioner's "contract" theory. For example *United States v. Rowell*, 243 U.S. 464 (1917) evidently heard but rejected such "contract" argument by surmising:

> "Besides, statutes of this type are not to be regarded as proposals by the government to enter

into executory contracts, but as laws which are amendable and repealable at the will of Congress, save that rights created by carrying them into effect cannot be divested or impaired. Gritts v. Fisher, supra; Choate v. Trapp, 224 U.S. 665, 671, . . . Sizemore v. Brady, 235 U.S. 441, 449." 243 U.S. at 470.

Similarly, *Sizemore v. Brady*, 235 U.S. 441 (1914) rejected such contract rights, holding that allotment rights don't vest until the allotment is actually applied for as provided by the statute. See infra at I.C. for the discussion of *Sizemore*.

Also *Starr v. Long Jim*, 227 U.S. 614 (1913) considered but rejected arguments favoring allotment rights pursuant to a tribal agreement. Long Jim held land governed by both the Moses Agreement (a tribal agreement with the federal government) and an allotment act. This decision specified that Long Jim took no vested rights under the Moses Agreement. Further, the allotment act, was the source of such rights served to restrict the provisions of the Moses Agreement. The entire approach in *Starr v. Long Jim*, is impossible to reconcile with Petitioner's tribal "contract" theory of allotment rights.

(d) Petitioner's "Contract" Rights Theory of Choate v. Trapp Is Rejected By The Interpretation Of The Leading Scholar In The Field.

On several occasions in his noted treatise, *The Handbook of Federal Indian Law*, Felix Cohen specifically interprets *Choate* as protecting private property rights.

"As in the case of *private property* generally, Congress cannot deprive an Indian of his land or any interest therein without due process of law or take such property for public purposes without just compensation. *An outstanding decision on the subject is Choate v. Trapp*. . . . F. Cohen, *Handbook of Federal Indian Law*, 97-98 (1940). (Emphasis added)

Also,

"Under the United States Constitution, the rights of the Indian in his *private property*, whatever they may be, are secured and enforced to the same extent and in the same way as other residents or citizens of the United States." Id. at 195. (emphasis added) (citing *Choate v. Trapp*)

with such rights stemming from a statute.

"The principle of construction in favor of Indians is also applied to Congressional statutes", F. Cohen, *Handbook of Federal Indian Law*, 172 (1940), (citing *Choate v. Trapp*, as authority for this proposition.)

"The *leading case of Choate v. Trapp*, held that under *this statute* allottees acquired a *vested property right* to exemption from state taxation . . . and could not be impaired by subsequent Congressional action without violation of the Fifth Amendment of the Federal Constitution." Id. at 437. (Emphasis added)

Mr. Cohen is undoubtedly the foremost expert in this field to date.[50] Accordingly, his interpretation should be most persuasive, and is indeed correct.

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[50]This Court recognized Mr. Cohen as an "acknowledged expert" in *Squire v. Capoeman*, 351 U.S. 1, 9 (1955).

(e) "Contractual" vs. "Non-Contractual Categorization Of Allotment Rights Cannot Remove Such Rights From The Scope Of Due Process Protection.

Petitioner *implies* that because the Northern Cheyenne allotment rights are not contract rights, they do not fall within the ambit of *Choate v. Trapp's* due process protection. Even assuming this arguendo the Petitioner's "contract" theory does not undermine the allottee's rights for two reasons.

First, at the time when *Choate* was decided, due process protected both contract rights and property rights. The allottee's rights became property rights during the 1930's.[51] Consequently, *Choate* protects the rights at issue as property rights even using the restricted set of interests protected by due process at that time.

Second, the argument that conventional property or contract rights are necessary to invoke due process protection has become moot. When *Choate* was decided an interest in property must fit into either a technical contract or property category to receive due process protection. Otherwise, the interest would be deemed a "privilege" or "gratuity" not protected by due process. However, in recent years the "privilege doctrine" has whithered substantially.[52] Today, it is established that interests flowing solely from a statutory "offer" are

[51]See infra at Sec. I.C.

[52]Fleming v. Nestor, 363 U.S. 603 (1960); Sherbert v. Verner, 374 U.S. 398 (1963); Goldberg v. Kelly, 397 U.S. 254 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969); Graham v. Richardson, 403 U.S. 365 (1971); and Morrissey v. Brewer, 408 U.S. 471 (1972).

protected by the Constitution,[53] including the requisites of due process.[54] Indeed, just last term this Court held that "contractual" vs. "non-contractual" characterization of a statutory benefit does not affect its constitutional protection.

> "We do not *see how the fact that social security benefits are 'non-contractual' can sanction differential protection* for covered employees which is solely gender-based." Weinberger v. Wiesenfeld, ___ U.S. ___, 42 L.Ed. 514 (March 19, 1975). (Emphasis added)

Consequently, due process protection attached.

Analogously, the allottees availed themselves of a statutory offer. In response the government conferred the benefit of land ownership. By issuing the trust patents the government has specifically approved each specific beneficiary. Consequently, today a constitutionally protected entitlement has accrued to the allottees by virtue of their bringing themselves within the class benefited by the statute.

[53]Sherbert v. Verner, 374 U.S. 398 (1963); Shapiro v. Thompson, 394 U.S. 618 (1969); Jiminez v. Weinberger, 417 U.S. 628 (1974) and Graham v. Richardson, 403 U.S. 365 (1971).

[54]Goldberg v. Kelly, 397 U.S. 254 (1970); Wheeler v. Montgomery, 397 U.S. 280 (1970); and Arnett v. Kennedy, 416 U.S. 134 (1974).

C. Respondent's Rights In Their Allotments Vested When They Selected The Land And Submitted Their Application For The Trust Patent.

The Petitioner claims *Choate v. Trapp*, is inapplicable to the rights at issue because *Choate* only applies to completed allotments.[55] This argument raises the question: When do the allottees' rights in the allotment vest?

While the *Choate* decision held the allottees' rights under trust patents were vested, it did not specify the moment of vesting. Several years later *Sizemore v. Brady*, 235 U.S. 441 (1914) roughly determined the time of vesting. In *Sizemore*, the issue was: when did the allotment enter the decedent's estate? This Court held the allotment entered the estate when "selected or made"[56] on behalf of his estate. Consequently, the decedent's interest vested when the allotment was "selected or made".

The Department of the Interior was then left to decide when an allotment was made. Numerous Department of the Interior decisions held the allotment was made for purposes of vesting the allottees' rights when the allotment application was filed with the local office. See *Rights of Indians to Allotment in San Juan County, Utah*, 57 I.D. 547 (1942); *Allotment Selections on the Fort Belknap Indian Reservation*, 55 I.D. 295 (1935); *Raymond Bear Hill*, 52 I.D. 688 (1929). This rule was not limited to Indian allotments. Indeed, in conveyances with the federal government as grantor, the

[55]Petitioner's Brief at Sec. 3.

[56]235 U.S. at 451.

grantees' rights were considered vested upon filing a proper application, be the applicant an Indian,[57] a private non-Indian party[58] or a State.[59] Thus, vesting upon filing the application was a very broad rule.

Vesting accrued upon filing the application despite recognition of such rights being contrary to later policies of Interior,[60] or despite such rights being abrogated by subsequent statute.[61]

Consequently, change in the law by statutory amendment could only affect land covered by applications filed after the effective date of the act.[62]

While long established case law acknowledged vesting prior to issuance of the patent,[63] this Court finally pinpointed the moment of vesting for an Indian allotment in the case of *Arenas v. United States*, 322

[57]Raymond Bear Hill, 52 I.D. 688 (1929).

[58]Payne v. Central Pacific Ry. Co. 255 U.S. 489 (1920); Benson Min. & Smelting Co. v. Alta Min. & Smelting Co., 145 U.S. 428 (1892).

[59]Wyoming v. United States, 255 U.S. 489 (1920) and Payne v. New Mexico, 255 U.S. 367 (1920).

[60]Arenas v. United States, 322 U.S. 419 (1944) and Ballinger v. United States, 216 U.S. 240 (1909).

[61]Wyoming v. United States, 255 U.S. 489 (1920); Payne v. New Mexico, 255 U.S. 367 (1920); Allotment Selections on the Fort Belknap Indian Reservation, 55 I.D. 295 (1935); and Raymond Bear Hill, 52 I.D. 688 (1929).

[62]Raymond Bear Hill, 52 I.D. 688 (1929).

[63]Ballinger v. United States, 216 U.S. 240 (1909); Hy-Yu-Tse-Mil-Kin v. Smith, 194 U.S. 401 (1904); Elwood v. Flannigan, 14 Otto 562 (1882); Crews v. Burcham, 1 Black 352 (1862) and Doe v. Wilson, 23 How. 457 (1859).

U.S. 419 (1944). Arenas filed his application for an allotment, but the Secretary of Interior refused to issue the trust patent. This Court held that Arenas' rights vested upon filing his application so the Secretary must honor those rights by issuing the patent. So at last in *Arenas* it is established beyond doubt that Indian allottees' rights vest upon filing their allotment application.

As applied to the instant case the issue becomes; when did the Northern Cheyenne allottees apply for their allotments? While no exact dates are available, the applications must have been filed by June 18, 1934. This is because the Wheeler Howard Act which became effective on June 18, 1934 stopped allotment of tribal land.[64] Only allotment applications filed prior to that date were approved.[65] As a result all the Northern Cheyenne allottees must have filed their applications by June 18, 1934. Since all the allotment rights vested as of that date, the vesting and the protection afforded by *Choate v. Trapp* have applied to the allotments at issue for the past twenty-six years.

[64]Act of June 18, 1934, 48 Stat. 984.

[65]Allotment Selections on the Fort Belknap Reservation, 55 I.D. 295 (1935).

II.

THE 1926 ALLOTMENT ACT OPERATED TO CONVEY AN IMMEDIATELY VESTING (UPON FILING THE ALLOTMENT APPLICATION) INTEREST IN THE MINERALS AT ISSUE.

A. The Legislative History Of The 1926 Act Reveals That Congress Knowingly Rejected Any Proposed Delay In Vesting The Minerals Underlying Allotment Lands.

The Department of Interior was originally opposed[66] to any allotment of the Northern Cheyenne Indian Reservation but evidently bowed to the wishes of Senator Walsh of Montana in consenting to support this bill.[67] As a result the original version of the allotment act was narrowly drafted.

The major Congressional examination of this bill occurred in the Senate Committee on Indian Affairs. In the course of examining this bill the Committee substantially re-wrote it.[68] Congress agreed to the

[66]Appendix at A.

[67]See the letter from Secretary of Interior Mr. Hubert Work at Sen.Rep.No. 638, 69th Cong. 1st Sess. 3 (1926).

[68]The Senate Committee on Indian Affairs in re-writing this bill substantially broadened the benefits conferred on the allottees. In addition to expanding the allotment from "only the surface" to include the remainder interest in minerals, the Committee also increased the size of allotment plots from 80 to 160 acres, provided for per capita payments for designating town sites and for the sale of lots in such town sites. Also the bill as it emerged from this committee is set forth at 67 Cong. Rec. 9735 (1926).

amendments made by this Committee so the Committee's sentiments were officially concurred in. Since the Senate Committee on Indian Affairs was the fulcrum of Congress' inquiry and action in revising this 1926 allotment act, it is significant to examine the changes in the bill's mineral provisions as presented to the Committee and as finally reported out.

The section disposing of the mineral estate, when presented to the Committee read:

> "*Provided*, however, That *only the surface of any lands* in this reservation *may be allotted*, and all minerals on said lands are hereby reserved for the benefit of the Tribe: *Provided, further*, That *at the expiration of fifty years* from the date of the approval of this Act, the coal or other mineral deposits of said allotments *shall become the property of the respective allottees* or their heirs or assigns." (Emphasis added) [69]

Note the proposed bill provided for allotment of "*. . . only the surface . . .*". The Committee found this wording too restrictive. Consequently, *the Committee rejected this version*, allotting "only the surface . . ." and broadened the mineral grant by inserting:

> "That the timber, coal or other minerals, including oil, gas and other natural deposits, on said reservation are hereby reserved for the benefit of the Tribe: *Provided*, That at the expiration of fifty years from the date of the approval of this Act, the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall become the property of the respective allottees or their heirs:. . . ."[70]

[69] 67 Cong. Rec. 6522 (1926).

[70] 67 Cong. Rec. 9735 (1926).

This is the language which finally emerged as the grant of minerals in the final act.

Thus the Committee was presented with and considered a restricted mineral grant. However, the Committee rejected allotting ". . . only the surface . . ." in favor of the present language.[71]

Such deliberate rejection of the "surface only" language by the Committee is strong evidence of Congress' intent not to delay *vesting* the minerals.

In addition, the bill, as presented to the Senate Committee on Indian Affairs, required a geological survey to determine the mineral land and withhold this land from allotment.[72] However, the Committee deleted the "geological survey" section evidencing further intent to allot the minerals.

B. Neither The 1926 Allotment Act Nor The Language Of The Trust Patents Reserve Any Power In Congress To Divest The Allottees' Mineral Interest.

Petitioner's entire argument is permeated with the rather ill defined notion that Congress retains boundless authority to divest the allottees' mineral interest without compensation. The closest Petitioner comes to any actual authority for such a proposition is Sec. 1 of the Northern Cheyenne Allotment Act which provides:

> ". . . That the Northern Cheyenne Indian Reservation . . . is hereby declared to be the property of said Indians, *subject to such control and manage-*

[71] 67 Cong. Rec. 9735 (1926).

[72] 67 Cong. Rec. 6522 (1926).

ment of said property, as the Congress of the United States may direct." Act of June 3, 1926, 44 Stat. 690. (Emphasis added)

Petitioner interprets this "control and management" language as a retained power to abrogate individual property rights. However, such a construction is erroneous for several reasons.

First, interpreting the Section 1 "control and management" clause as the sweeping reservation of power necessary to terminate the allottees' interests at issue is directly contrary to the policies underlying a host of allotment acts.

The general framework of the allotment system was set forth in the General Allotment Act,[73] with separate implementing acts for each reservation. The statute at issue,[74] implemented the allotment system on the Northern Cheyenne Indian Reservation. The General Allotment Act and the various implementing acts should be construed "pari materia".[75] Consequently, the policies expressed in the General Allotment Act and the allotment system apply to the specific implementing acts, such as the statute at issue.

As was stated earlier[76] the purpose of the allotment system was to give Indians individual ownership of land. The entire allotment system was geared toward vesting rights to allotments in the allottees with a view toward the ultimate emancipation of the ward-Indians.[77] Thus,

[73]Act of February 8, 1887, 24 Stat. 388.

[74]Act of June 3, 1926, 44 Stat. 690.

[75]Arenas v. United States, 322 U.S. 419 (1943) and Tiger v. Western Investment Co., 221 U.S. 286, 306 (1911).

[76]Supra at Sec. IA.

[77]F. Cohen, *Handbook of Federal Indian Law*, 206-21 (1940).

vesting property rights in individual allottees was the central policy underlying the allotment system. Since the Northern Cheyenne allotment act was passed to implement the allotment system on the Northern Cheyenne Indian Reservation, it should be interpreted as furthering the allotment system's purpose of vesting property rights in individual allottees.

Please note that Section 1 of the 1926 act relates to the entire Reservation in the most general terms. Section 1 is not limited to minerals. Consequently, if the "control and management" language of Section 1 may be used as authority to terminate rights set forth in another part of the act, then such a broad reservation could be used to terminate *any* property rights on the Northern Cheyenne Indian Reservation. Thus, if Petitioner's construction of Section 1 were accepted, it would be impossible for any property rights on this reservation to vest in anyone! Were Petitioner's construction of Section 1 correct, we would find Congress in the curious position of beginning the text of an allotment act with a statement which destroys the very purpose of the act.

Were Petitioner's construction of Section 1 correct, one cannot imagine what schizoid design Congress could have had in mind to write an allotment act which would leave all property rights dangling perpetually at the Congressional whim. Clearly, such an interpretation of Section 1 should be rejected.

Second, the "control and management" language of Section 1 is a separate section from the section granting mineral rights. This is significant because the section which deals with mineral rights *specifically limits Congressional management* to *un*allotted lands.

> "...*Provided further*, that the *un*allotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient ..." Act of June 3, 1926, 44 Stat. 690, Sec. 3. (Emphasis added)

Third, the "control and management" language of Section 1 is part of the introductory language of the Act. When read in this context, this "control and management" phrase emerges as a general statement of policy; that Congress intends to exercise its *normal guardianship duties* on the Northern Cheyenne Indian Reservation.[78] It should not be elevated to a "juggernaut" clause, somehow reserving in Congress the power to devastate otherwise constitutionally protected rights.

Petitioner points to the language of the *trust patents* reserving minerals in the tribe as evidence of a delayed vesting in the allottees. However, the language of the trust patents does not substantiate any delayed vesting.

Initially, the language of the trust patent is not controlling. Indeed the *Choate* decision specified the allottees took all the rights conferred in the statute regardless of the language in the trust patent;

> "Those who signed the patent would not convey more rights than were granted by that part of the Curtis Act, *nor could they, by omission, deprive the patentee of any exemption to which he was thereby entitled.*" Choate v. Trapp, 224 U.S. at 673. (Emphasis added)

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[78]This becomes apparent upon viewing this language as the opening section of Congress' first substantive legislation regarding the Northern Cheyenne Indian Reservation.

Consequently, omitting reference to the allottees remainder type mineral interest in the trust patent cannot prejudice the existence of that right.

Secondly, the trust patent states:

> "NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, has allotted, and by these presents does allot, unto the said Indian the above-described land as a Homestead, *subject to all the provisions, conditions, limitations, and restrictions contained in said Act of June 3, 1926*, and hereby declares that it does and will hold the land so allotted in trust for the sole use and benefit of the said allottee, ..."[79] (Emphasis added)

The trust patent specifies it is subject to the terms of the 1926 Allotment Act. Therefore, the trust patent incorporates the allottee's remainder interest by reference into the terms of the trust patent.

The *third* reason the trust patent's language does not delay the vesting is, the trust patent only refers to the possessory incidents of ownership. Since the tribe had possession of the minerals through 1976, it was listed in the trust patent as the owner of the minerals. Since land held under a trust patent was not alienable, it was not necessary to specify the future interests in such land.

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[79]Appendix at A.

C. When Congress Intended To Reserve The Power To Extend Tribal Ownership Of Minerals It Included The Requisite "Unless Otherwise Provided By Congress" Proviso In The Allotment Act's Grant Of Minerals. The Unusual Absence Of This Proviso Indicates Congress' Intent To Immediately Vest The "Remainder" Interest In The Minerals In The Allottees.

If Congress desired to reserve the power to alter individual allotment rights such power must be specifically set forth in the allotment act.[80] It may not be inferred from Congress' general plenary power[81] which only controls tribal property. And it may only affect rights vesting *after* passage of the act.[82] The necessity of a specific reservation of power is illustrated by the language of other allotment acts. Numerous allotment acts including those for the Crow,[83] Fort Belknap,[84] Blackfeet,[85] Standing Rock and Cheyenne River,[86] and Osage Indian Reservations[87] specifically

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[80]*Adams v. Osage Tribe*, 59 F.2d 653 (10th Cir. 1932) approved an extension of tribal mineral ownership because Congress reserved its power to re-allocate the minerals by including the "unless provided otherwise by Congress" limitation in the allotment act's mineral grant. Consequently, the allottees to subject to this condition.

[81]Mullen v. United States, 224 U.S. 448 (1912).

[82]Raymond Bear Hill, 52 I.D. 688 (1929).

[83]Act of June 4, 1920, 41 Stat. 751.

[84]Act of March 3, 1921, 41 Stat. 1355.

[85]Act of June 30, 1919, 41 Stat. 17.

[86]Act of May 29, 1908, 35 Stat. 460.

[87]Act of June 28, 1906, 34 Stat. 539.

included such a reservation of power to alter disposition of the mineral estate by stating "... unless otherwise provided by Congress" in the allotment act's mineral grant. However, if this proviso were unnecessary (as Petitioner contends) this repeatedly used proviso would be mere surplusage. Rather the repeated use of virtually the same statutory language is a strong indication that such specific reservation of power was necessary.

This Court has repeatedly rejected claims of an implied power in Congress to subsequently alter vested allotments rights. Indeed if such implied power existed *Choate v. Trapp* would have been decided opposite its actual outcome. Also, *Woodward v. DeGraffenried*, 238 U.S. 284 (1915) held vested allotment rights immune from redistributive statutes. In *Woodward*, the allotment at issue was taken under the terms of the Curtis Act. The Curtis Act allotment was provisional until approved by the tribe. Later, the tribe approved the allotment in the Original Creek Agreement. The allottees' rights vested at this time. The Original Creek Agreement incorporated Creek intestacy laws. Prior to passage of the Supplemental Creek Agreement the allottee died and the allotment vested in her estate. The Supplemental Creek Agreement substituted Arkansas intestacy laws. The issue in *Woodward* was, which intestacy law controlled descent of the allotment? In holding Creek law controlling, this Court noted that once the heirs' right to a distributive share vested it could not be removed by subsequent Congressional enactment. Recognition of such vesting is clearly at odds with any supposed implied power in Congress to change such distributive scheme *IF* interpreted to affect rights previously vested.

Also *Arenas v. United States*, 322 U.S. 419 (1944) rejected any implied federal power to re-allocate vested allotment rights. In *Arenas* the Secretary of the Interior deemed it not in the best interest of the tribe to allot land to the Mission Indians. Consequently, the Secretary refused to honor Lee Arenas' allotment application. This Court rebuked this refusal and compelled issuance of the allotment. Again, such result does not square with the Petitioner's claimed implied federal power to re-distribute Indian property.

A rather pointed rejection of any implied power of the federal government to re-distribute allotment rights is found in *Leecy v. United States*, 190 F. 289 (8th Cir. 1911). In *Leecy* the allottee had filed an application for allotment of a particular tract. However, the Bureau of Indian Affairs and the tribe had a contract whereby the land was reserved for tribal use as a sawmill. Despite several statutes giving the Secretary of the Interior broad supervisory power over Indian lands and allotments, and despite the contract with the tribe, the Secretary did not have authority to withhold Leecy's allotment. *The reason was absence of any specific statutory authority*. Consequently, an express statutory reservation of authority is also required to re-allocate the minerals at issue.

When Congress intended to reserve the right to alter disposition of the minerals it undertook to do so. On numerous occasions Congress reserved minerals to the tribe for a period, then may transfer such minerals to the allottees. However, in such instances, Congress left its options open to extend tribal ownership. Again the allotment acts covering the Osage[88] and Standing Rock

[88]Act of June 28, 1906, 34 Stat. 539.

and Cheyenne River,[89] and most Montana reservations including the Blackfeet,[90] Fort Belknap,[91] and the Northern Cheyenne's neighboring Crow[92] Indian Reservation all provided for a delayed shifting of the minerals possession from the tribal councils to the allottees. However, ALL these allotment acts conditioned such transfer by providing "unless provided otherwise by Congress" or by equivalent proviso. Thus it had become common practice for Congress to reserve the power to extend tribal ownership of minerals long prior to enactment of the Northern Cheyenne Allotment Act (all the other allotment acts listed above were enacted *prior to* the act at issue.) As a result of the common practice of including this "unless provided otherwise. . . . " proviso, the delegation of such proviso may only be attributed to the fact that Congress did not intend for such power to exist. The rule of construction as appropriately set for in *Monson v. Simonson*, 231 U.S. 341 (1913) is;

> "And it is significant that the provision contains no words directly or presently removing the existing restrictions upon alienation, while other kindred provisions in the same act, relating to other allotments, contain the words 'and all restrictions as to sale, encumbrance, or taxation of said lands are *hereby* removed.' *It hardly can be said that the absence of those words in this instance and their presence in others is not indicative of a difference in meaning and purpose.*" (Emphasis added)

[89]Act of May 29, 1908, 35 Stat. 460.

[90]Act of June 30, 1919, 41 Stat. 17.

[91]Act of March 3, 1921, 41 Stat. 1355.

[92]Act of June 4, 1920, 41 Stat. 751.

The omission of the "unless provided otherwise by Congress . . ." proviso did carry with it a difference in meaning. The difference in meaning indicates Congress' intent not to reserve such power.

Indeed such power could not exist if, as designed by Congress, the allottees' "remainder" interest vested upon filing a proper allotment application.

D. Congress' Specifically Requiring The Tribal Council To Quiet Title In The Minerals Indicates Strong Congressional Doubt As To The Constitutionality Of The 1968 Amendment.

Petitioner terms the 1968 amendment an "exemplary" exercise of Congress' plenary powers over Indian affairs.[93] Petitioner stands alone in this belief. Apparently not even Congress thought this act "exemplary" for significantly the 1968 amendment specifically required the tribal council to bring this suit to test the validity of divesting the allottees' mineral estate. As the 1968 amendment stated:

> "Sec. 2. The Northern Cheyenne Tribe is authorized to commence in the United States District Court for the District of Montana an action against the allottees who received allotments pursuant to the Act of June 3, 1926, as amended, their heirs or devisees, either individually or as a class, *to determine whether* under the provisions of the Act of June 3, 1926, as amended, the allottees, their heirs or devisees, have *received a vested property*

[93]Petitioner's Brief at Sec. 5.

> *right in the minerals which is protected by the fifth amendment.* The United States District Court for the District of Montana shall have jurisdiction to hear and determine the action and an appeal from its judgment may be taken as provided by law. *If the court determines that the allottees, their heirs or devisees, have a vested interest in the minerals which is protected by the fifth amendment, or if the tribe does not commence an action as here authorized within two years from the date of this Act, the first section of this Act shall cease to have any force or effect,* and the provisions of section 3 of the Act of June 3, 1926, as amended by the Acts of July 24, 1947, and September 21, 1961, shall thereupon be carried out as fully as if section 3 had not been amended by this Act." Act of July 24, 1968, 82 Stat. 424. (emphasis added)

Thus, Congress provided that the 1968 amendment would be void unless vindicated by the courts. The purpose of this section is to insure that the federal government would not be liable to the allottees in an Indian Claim Commission action for the value of the minerals divested. *Congress was so deeply concerned about such liability as to mandate this lawsuit by express statutory proviso and specifically condition the tribal council's rights on winning this suit.* This indicates a *formidable Congressional apprehension*[94] that the 1968 amendment was an unconstitutional taking. Indeed, the Ninth Circuit's decision below proves this apprehension to be well-founded. The decision below specifically recognized the Congressional doubts behind this section by commenting on Section 2 as follows:

[94]The legislative history mentions the problem of divestment several times H.R.Rep.No. 1292, 90th Cong. 2nd. Sess. 4 (1968).

> *"That Congress realized it may have exceeded even its own plenary power* to deal with tribal property (United States v. Jim, et al., supra.) in enacting the amendment of July 28, 1968, here in issue *is evidenced by the unusual nature of the enactment itself. The 1968 amendment to the 1926 Allotment Act,* attempting to reserve the mineral deposits to the tribe in perpetuity, is wholly provisional, and explicitly leaves the validity of the enactment entirely up to the court." Northern Cheyenne Tribe v. Northern Cheyenne Class of Allottees, Heirs and Devisees, 505 F.2d 268, 273 (9th Cir. 1974). (Emphasis added)

Thus it has been recognized that Congress' intent being couched in such apprehension does, in itself, raise substantial doubt regarding the 1968 amendment's validity. While such doubts are not conclusive, it is important that this Court be appraised of the fact that Congress tacitly acknowledged it was probably reaching beyond its lawful powers.

III.

WHILE THE 1968 AMENDMENT OSTENSIBLY RE-ALLOCATES THE COAL TO THE TRIBAL COUNCIL, IT ACTUALLY ACCOMPLISHES A SUBSTANTIAL TAKING FOR NON-INDIAN PURPOSES. THEREFORE, THE 1968 AMENDMENT EXCEEDS CONGRESS' PLENARY POWER.

Federal re-allocation of tribal property falls into two categories.

First re-allocation in which the benefits are shifted *among* the tribal members. Cases such as *Gritts v.*

Fisher, 224 U.S. 640 and *United States v. Jim,* 409 U.S. 80 (1972) fall in this category. The validity of such re-allocations rests on the assumption that a tribal property is still being kept within the tribe. As a result the courts will not interfere with "in house" reallocation of communally owned assets.

In the *second* category Congress or federal agents reallocate tribal property by removing property from tribal ownership to benefit non-Indians. This category of re-allocation is viewed very differently from the first category. When the re-allocation removes property from the benefit of the tribe it is viewed with strict disfavor. *Lane v. Santa Rosa,* 249 U.S. 110 at 113 (1919) described such re-allocation as: "That would not be an exercise of guardianship but an act of confiscation". Such re-allocations abrogate the Indians' property rights and are compensable in damage actions.[95]

Consequently, if the 1968 amendment operates to remove part of the Northern Cheyenne mineral estate from the benefit of the tribe or tribal members, as a class, such re-allocation falls within the disfavored second category. While on its face, the 1968 amendment merely gives the minerals to the tribal council, it actually accomplishes a very substantial diversion of the consequent royalties to non-Indians use. This depletion of the mineral estate available as beneficial to the Indians is caused by 25 U.S.C. 398c which provides:

> "Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells or other rights, property, or assets of any lessee upon lands within Executive Order Indian reservations in the same

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[95]This is the theory behind Indian Claims Commission actions as authorized at 25 U.S.C. 70 as opposed to normal guardianship re-allocations.

> manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury: Provided, That such taxes shall not become a lien or charge of any kind against the land or other property of such Indians."

The Northern Cheyenne Indian Reservation is an Executive Order reservation.[96]

Thus, if the coal underlying the allotment land is mined as tribal property, it is subject to state taxes. *This is very significant in this case because Montana imposes a 30% tax on such coal!*[97] The proceeds from this tax go to the State of Montana with no obligation to use it to benefit the Northern Cheyenne people.

However "... it is not lightly to be assumed that Congress intended to tax the ward ..."[98] Thus, the allottees' interests should be particularly favored because if the coal is the property of the allottees, it is immune from such taxation according to *Squire v. Capoeman*, 351 U.S. 1 (1955).

Consequently, if the Respondent/Allottees prevail in this suit, the coal is immune from taxation hence all the royalties from the coal at issue remain under Indian control for Indian use and benefit. But if the Tribal Council wins this suit the coal will be taxable and the

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[96]Executive Order of President Chester A. Arthur on November 26, 1884, C. Kapplar *Indian Affairs: Laws and Treaties*, Vol. I at 860.

[97]84-1314 R.C.M. (1947).

[98]Squire v. Capoeman, 351 U.S. 19 (1955).

Indians will lose 30% of the royalties "off the top" before it can be used to benefit the Northern Cheyenne people. Such a depletion of the mineral estate (a loss probably in excess of one billion dollars!) for non-Indian purposes is clearly beyond Congress' plenary power. Lane v. Santa Rosa, 249 U.S. 110 (1919). Since this is the effect, as a matter of law, of the 1968 amendment's "re-allocation", the 1968 amendment should be ruled invalid.

IV.

OWNERSHIP OF TRIBAL LAND, THE TRIBAL COUNCIL'S LEGISLATIVE AUTHORITY, AND SUPERVISION OF MINERAL LEASING BY THE SECRETARY OF INTERIOR PROVIDE AMPLE MEANS OF REGULATING ANY ON-RESERVATION MINERAL DEVELOPMENT WITHOUT DIVESTING THE INTERESTS OF THE INDIAN ALLOTTEES.

A. Ownership Of Tribal Land And The Tribe's Legislative Authority Provide Tribe With Ample Means Of Regulating Any On-Reservation Mineral Development Without Divesting The Interests Of The Indian Allottees.

The tribal council implies it must maintain complete control of the mineral estate under the Northern Cheyenne Indian Reservation to adequately control any mineral development.[99] But, the issue in this case is whether the 1926 allotment act conferred a vested right

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[99]Petitioner's Brief at Sec. 5.

to the allottees. Since the tribal control of mineral development is not addressed to the 1926 Act's vesting issue, it is not technically at issue in this case. However, as the Petitioner has presented the issue to this Court, Respondent feels compelled to reply.

It is not necessary for the tribal council to maintain complete ownership of the mineral estate to adequately control mineral development on the Reservation. There are several reasons for this. The first reason, is that approximately sixty-two percent of the Northern Cheyenne Indian Reservation is already tribally owned. Consequently, the tribal council, as owner of this land, may control or restrict coal mining on the majority of the Reservation through its lease negotiations. It is only the remaining non-tribal land constituting approximately thirty-two percent of the reservation, here at issue. The tribal council may exercise comprehensive control over any mineral development on this non-tribal land through exercise of its governmental powers, *regardless of who owns the coal.*

Under the Wheeler Howard Act, Congress delegated the general governmental responsibilities over reservations to tribal councils.[100] The Northern Cheyenne Tribe was organized under the Wheeler Howard Act.

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[100]25 U.S.C. 476 authorized various Indian tribes to adopt a tribal constitution and by-laws for their own self government. Under the terms of this act the tribal council may pass tribal ordinances which become effective upon approval by the Secretary of the Interior. In effect this is a general delegation of governmental responsibility to the tribe's governing body, subject to general supervision by the Secretary of the Interior. See *Powers of Indian Tribes,* 55 I.D. 14 (1934) for the Department of Interior's interpretation of tribal powers under the Wheeler Howard Act.

Consequently the Northern Cheyenne Tribal Council may enact ordinances governing the conduct of business within the exterior boundaries of the Northern Cheyenne Indian Reservation.

Such governmental authority is broad enough to adequately regulate any coal development within the Reservation. Indeed, last term this Court re-affirmed a tribal council's authority to regulate business activity of non-Indians on the Reservation in *United States v. Mazurie,* __ U.S. __[101] 42 L.Ed.2d. 706 (Jan. 21, 1975). The *Mazurie* decision emphasized several earlier decisions of this Court giving tribal councils authority to regulate business of Indians and non-Indians alike.[102] Such tribal authority extends to both civil[103]

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[101] While the *Mazurie* case involved enforcement by federal, rather than tribal officials, the actual ordinance violated by Mazurie was tribal not federal. Just as Congress properly delegated legislative authority to the tribe in *Mazurie* at 18 U.S.C. 1161, Congress has likewise delegated the legislative authority necessary to regulate land use including coal mining to tribes such as the Northern Cheyenne at 25 U.S.C. 476. The *Mazurie* case further stands for broad tribal authority to regulate on-reservation business because it applied a tribal ordinance to activities by a non-Indian on fee patent land. See 42 L.Ed.2d. at 715.

[102] In both *Williams v. Lee*, 358 U.S. 217 (1959) and *Kennerly v. District Court,* 400 U.S. 423 (1971) this Court rebuffed attempts by non-Indians to sue in state courts on civil matters arising on Indian reservations. *Williams* and *Kennerly* both involved suits arising from commercial transactions, thus affirmed tribal authority to regulate such business activity. Since non-Indians are required to use tribal courts by the result of *Williams* and *Kennerly*, the legitimacy of such tribal jurisdiction is implicit in these decisions.

[103] *Williams v. Lee,* 358 U.S. 217 (1959) and *Kennerly v. District Court,* 400 U.S. 423 (1971) were both civil suits for collection of a debt.

and criminal law.[104] Further, such authority extends over the entire Reservation, whether the land involved is tribal,[105] trust patent or fee patent land.[106] Thus, the tribal council's governmental authority, within the Reservation, is comprehensive.

With such authority to regulate all business activity within the reservation, the tribal council may shape any on-Reservation mineral development by a variety of legislative schemes. For instance, the tribal council may set its own standards for lease provisions of non-tribal land by imposing such provisions as requisites to a tribal "business license" as was used in the *Mazurie* case. The tribal council could also impose its desired standards for mineral development through a set of zoning ordinances or land use planning ordinances. Enforcement of such provisions could be financed through a tribal tax on the regulated business

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[104] *United States v. Mazurie*, ___ U.S. ___, 42 L.Ed.2d. 706 (Jan. 21, 1975) was an appeal from a criminal conviction. Also recently the U.S. District Court for the Western District of Washington, affirmed trial court jurisdiction over an offense committed by a non-Indian on tribal property. Oliphant v. Schlie, ___ F.Supp. ___ No. 510-73C2 (W.D. Wash. April 5, 1974).

[105] 25 C.F.R. 171.29 specifically allows tribal by-laws, ordinances etc., to supercede even the federal regulations for leasing tribal lands.

[106] In the past, tribal authority arguably lapsed upon issuance of the fee patent. However, this checkerboard theory of tribal authority was rejected by *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Williams v. Lee*, 358 U.S. 217 (1959); *Kennerly v. District Court*, 400 U.S. 423 (1971) and again in *United States v. Mazurie*, ___ U.S. ___, 42 L.Ed.2d 706 (Jan. 21, 1975). Therefore, tribal authority now extends to all lands within the exterior boundaries of the reservation.

activity.[107] Clearly such legislative devices provide the tribal council with ample means of regulating or limiting any coal development on the Reservation without divesting its individual Indian constituents of their right to share in any consequent royalties.

B. The Truly Protective Scope Of Federal Supervision Of On-Reservation Mineral Leasing Specifically Hinges On Mineral Ownership In The Respondent/Allottees.

The Secretary of the Interior supervises mineral leasing on the reservation. The guidelines for this supervision are at 25 C.F.R. 171-172, 177. The sections dealing generally with mineral leasing on tribal[108] and allotted[109] land are addressed primarily to the conventional commercial aspects of such leases, i.e., disclosure of fiscal information by corporate lessees, bonding, royalty and rental payments, and the Secretary's approval of the lease. The Secretary's review of the lease provides a mechanism to assure that the Indian or tribe receives adequate royalties, bonding of the lessee, etc. In addition, all lease assignments must be approved by the Secretary of the Interior.[110] This will allow the Secretary to prevent any "land rush" by

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[107] In *Morris v. Hitchcock*, 194 U.S. 384 (1904) this Court affirmed tribal authority to tax on-Reservation business activity of non-Indians for business conducted on both trust allotments and fee patent town lots. Also see 23 Opps.Atty. Gen.528 approving a tribal excise tax on hay grown on the reservation.

[108] 25 C.F.R. 171.

[109] 25 C.F.R. 172.

[110] 25 C.F.R. 177.22(a).

only approving leases of actual operators and, disapproving leases of speculators. Consequently, any lessee will not be able to take undue advantage of the Indian party in these areas of commercial concern unless the Secretary of Interior is derelict in performing his supervisory duties.

Protection of the broader "environmental, cultural, historical and recreational" interests is set forth at 25 C.F.R. 177. Indeed, these broad interests must be taken into account under the requirements of the National Environmental Protection Act.[111] *However, 25 C.F.R. 177 limits such review in a manner crucial to the results of this case.* Review of environmental, cultural, etc., considerations is limited as follows:

> "The regulations in this part *do not cover* the exploration for oil and gas or the issuance of leases, or operations thereunder, nor minerals underlying *lands, the surface of which is not owned by the owner of the minerals.*" 25 C.F.R. 177.2 (b). (Emphasis added)

Viewing this limitation, the broader social considerations involved in strip mining only need be taken into account by the Department of the Interior if the Respondent/allottees prevail here before this court! If the tribal council prevails here, ownership of the minerals underlying the allotment lands will be severed from surface ownership. Consequently, if the Petitioner/tribal council wins here, the Department of the Interior evidently is NOT required to examine the

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[111]*Davis v. Morton,* 469 F.2d 593 (10th Cir. 1972) held the Secretary of the Interior's approving a lease for real estate development on tribal land was "major federal action" triggering the environmental review requirements of N.E.P.A., 42 U.S.C. 4321 et seq.

cultural, historical, environmental, etc.[112] considerations crucial to preserving the viability of the Northern Cheyenne Indian Reservation as a homeland. As a result, this vast and incredibly technical burden will be

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[112]Among the considerations that must be taken into account are: "The technical examination shall take into consideration the need for the preservation and protection of other resources, including cultural, recreational, scenic, historic, and ecological values; and control of erosion, flooding, and pollution of water; the isolation of toxic materials; the prevention of air pollution; the reclamation by revegetation replacement of soil, or by other means, of lands affected by the exploration or mining operations; the prevention of slides; the protection of fish and wildlife and their habitat; and the prevention of hazards to public health and safety." 25 C.F.R. 177.4(a)(1).

Mining activity may be curtailed if: "The superintendent may prohibit or otherwise restrict operations on any part of an area whenever it is determined that such part of the area described in an application for a permit or lease is such that previous experience under similar conditions has shown that operations cannot feasibly be conducted by any known methods or measures to avoid–(1) Rock or landslides which would be a hazard to human lives or endanger or destroy private or public property; or (2) Substantial deposition of sediment and silt into streams, lakes, reservoirs; or (3) A lowering of water quality below standards established by the appropriate State water pollution control agency, or by the Secretary of the Interior, or his authorized representative; or (4) Lowering of the quality of waters whose quality exceeds that required by the established standards–unless and until it has been affirmatively demonstrated to the Secretary of the Interior, or his authorized representative, that such lowering of quality is necessary to economic and social development and will not preclude any assigned uses made of such waters; or (5) The destruction of key wildlife habitat or important scenic, historical, or other natural or cultural features." 25 C.F.R. 177.4(d).

thrust on the nominal resources of the Northern Cheyenne Tribe.

However, if the Respondent/allottees win here, the mineral and surface estates of allotment lands remain intact, triggering the broad "environmental, cultural, historical, etc.[113] assessment prior to any mining activity.

V.

PETITIONER'S AUTHORITY DOES NOT SUPPORT ITS THESIS OF UNBRIDLED CONGRESSIONAL POWER OVER INDIVIDUAL INDIAN PROPERTY RIGHTS.

Petitioner cites numerous cases in its claim that Congress retains plenary power to re-allocate Indian property though such power is not expressly reserved. Here Petitioner paints the issues involved with a very broad brush so as to misconstrue the authorities cited and blur the distinction between individual and tribal property. However, upon examining this authority, it becomes apparent the cases cited lie on the periphery of the vesting process, but do NOT support any Congressional authority to re-allocate property once it has vested in the individual Indian. Since the rights at issue have vested, Petitioner's authority does not bear upon the rights before the Court.

The authorities cited fall into several categories which clearly do not apply to the rights at stake in this case. Such authorities may be categorized as follows:

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[113]See n. 112.

A. Tribal Property

The following cases only allow re-allocation of *tribal* property, *not individually owned property:*

United States v. Jim, 409 U.S. 80 (1972)

Chippewa Indians v. United States, 307 U.S. 1 (1938)

British-American Oil v. Board of Equalization, 299 U.S. 159 (1937)[114]

Chase Jr. v. United States, 256 U.S. 1 (1921)[115]

Nadeau v. Union Pacific Railroad, 253 U.S. 442 (1920)[116]

United States v. Chase, 245 U.S. 89 (1917)[117]

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[114]In *British-American* the tribe owned the mineral estate underlying alloted surface. This case allowed taxation of the minerals as tribal property. This case did not involve claims of any individual allottees nor did it prejudice any individual property rights.

[115]In *Chase Jr.*, a statute terminated allotment *before* Mr. Chase had selected his allotment. This court held that no individual rights had vested (since individual rights don't vest in an allotment until the application is properly filed) so the land remained tribal and could be re-allocated.

[116]In *Nadeau* the statute giving the railroad a right of way on the reservation was passed *prior to* selection of the land at issue for an allotment. Since individual claims do not attach until after selection by the allottee, the land was still tribal when allocated to the railroad.

[117]The *Chase* case involved a dispute over a tract of land between one who claimed under a right of occupancy through a treaty, and one who claimed the land through a later allotment statute. The rights under the allotment act prevailed. Prior to the allotment, the land retained its tribal character and no rights could vest therein. While recognizing Congress' power to re-allocate such *tribal* property, the *Chase* decision also acknowledged the rights later vested in the allottee.

Sizemore v. Brady, 235 U.S. 441 (1914)

Gritts v. Fisher, 224 U.S. 640 (1912)

Gritts v. Fisher is the lead case. The *Gritts* decision, accompanied by the *Choate* decision, only held that Congress may re-allocate *tribal* property.[118] However, the *Gritts* decision repeatedly stated its holding did not apply to individually owned allotments[119] for the status of individually owned property was thoroughly discussed in *Choate v. Trapp.* The *Gritts* and *Choate* decisions are discussed at length at Sec. I.B.1.

The Petitioner also relies extensively on *United States v. Jim, supra.*, as supporting Congress' supposedly unbridled power over Indian property. The *Jim* case involved a statute requiring oil and gas royalties be spent to benefit the inhabitants of the "Aneth Extension",[120] a portion of the Navajo Reservation. A later statute enlarged this class to beneficiaries to include all "Navajo Indians residing in San Juan County."[121] While allowing this expanded class of

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[118]The property at issue was a fund created by selling unallotted tribal land to homesteaders. Since the property sold to create the fund was tribal, the fund retained its character as "tribal property" until it was actually distributed. Cohen, *Handbook of Federal Indian Law* 184 n.8 (1941).

[119]The *Gritts* decision noted: "It is *not proposed to disturb the individual allotments* made to members. . . . It is conceded, and properly so, that the later legislation is valid and controlling unless it impairs or destroys rights which the act of 1902 vested in members living September 1, 1902 and enrolled under the act. *As has been indicated, their individual allotments are not affected.*" 224 U.S. at 640, 647-48 (Emphasis added).

[120]Referred to in Petitioner's Brief as "Anteh" extension. Petitioner's Brief at Sec. 2.

[121]Act of May 17, 1968, 82 Stat. 121.

beneficiaries, this Court emphasized the royalties at issue were tribal property by noting,

> "Congress in 1933 did not create constitutionally protected property rights in the appellees. The Aneth Extension was added to a tribal reservation, and *the leases which give rise to mineral royalties are tribal leases.* It is settled that "*[w]hatever title the Indians have is in the tribe*, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members." United States v. Jim, 409 U.S. at 82. (Emphasis added).

As the leases were "tribal leases" they fall under the rule set forth in *Gritts v. Fisher.* Accordingly, the *Jim* decision relied on *Gritts v. Fisher* as authority to re-allocate such "tribal leases". However, the instant case involves rights of individual Indians in allotment land not tribal property, so the *Jim* case is inapplicable to the rights at issue.

Petitioner also quotes extensively from *Sizemore v. Brady*, 235 U.S. 441 (1914) to gain support for their notion of Congress' unlimited plenary power. However, the holding in *Sizemore* actually affirms the vesting of individual rights in an allotment once the application is filed.

In *Sizemore*, Grayson, a Creek Indian, died *before selecting an allotment.* Under the Creek intestacy laws the maternal heirs were favored. However, Congress later amended the intestacy laws in the Supplemental Creek Agreement to favor paternal relatives. After this amended intestacy law took effect, an allotment was selected on Grayson's behalf for his estate. The *Sizemore* case was a dispute between the maternal and paternal heirs to determine which intestacy law controlled disposition of the allotment.

The maternal heirs raised the constitutional claim by arguing the allotment act *per se* gave the allottee vested rights "*in praesenti*" without the allottee's application. Following this theory Grayson would have then received an interest in the allotment which would pass to his maternal heirs upon his death according to the pre-amendment intestacy law. Under the maternal heirs' "theory" the intestacy amendment was an un-constitutional attempt to divest them of an interest in the estate.

However, the constitutional question raised by the maternal heirs only arises if the allotment entered Grayson's estate prior to the intestacy law's amendment. This is because the intestacy law in force when the allotment entered the estate would determine its descent. Therefore, the issue was basically; "When did the allotment enter Grayson's estate?"

In deciding this question, this Court reasoned:

> "We have seen the allotment in question was not selected or made until after the supplemental agreement went into effect. The heirs designated in Chapter 49 of Mansfield's Digest were therefore the true beneficiaries." 235 U.S. at 451.

So the decision in *Sizemore* simply held the allotment did not enter Grayson's estate until it was selected and the application filed. Accord, see *Woodward v. DeGraffenried*, 238 U.S. 284 (1915).[122] Since the allotment was not chosen until after the intestacy

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[122]*Woodward* interpreted the same statutes as *Sizemore* consistently with *Sizemore*. In *Woodward*, the allotment vested prior to the intestacy law's amendment so the Creek intestacy laws controlled. *Woodward* specifically reconciled *Sizemore*.

laws were amended, Grayson's estate acquired no rights which could pass to his maternal heirs.

When the intestacy laws were amended, no rights had vested in the allotment so it was then tribal property which could be re-allocated by amending the intestacy laws. Sizemore did not, as Petitioner contends, allow Congress to abrogate any vested rights of the heirs by subsequent legislation.

The Petitioner also notes that *Chippewa Indians v. United States*, 307 U.S. 1 (1938) is strongly analogous to the case at hand. While the interests involved in both cases are similar, the results of the *Chippewa* case are not applicable to the instant suit. This is because the *Chippewa* case only allowed re-allocation of tribal property (during the term of tribal ownership) but did not affect the right of the individual Indians to possession upon the ultimate distribution of the res.

In both *Chippewa* and the instant suit, the property was tribal for a term of fifty years, then transferred to the individual Indians. In *Chippewa* the government evidently made unauthorized expenditures from the trust fund during the tribal ownership. The *Chippewa* decision simply held the government could re-allocate expenditures from the fund *as tribal property during the term of tribal ownership. However,* this *Chippewa* decision *only dealt with the power to administer the fund while it was tribal.* It did not interfere with the individual Indian remaindermen's right to ultimately receive the property when it was distributed.

Analogizing this to the *instant case*, admittedly the tribe may lease and exploit the minerals during its estate for fifty years. This would deplete the mineral estate ultimately taken by the allottees just as the government's expenditures depleted the amount of the

fund ultimately taken by the Chippewas. Thus, in both situations, the government may re-allocate use of the property during the tribal ownership.

However this control is limited to the period of tribal ownership. Once the period of tribal ownership ceases the government cannot alter the right of the individual Indians to receive such property. See *Arenas v. United States*, 322 U.S. 419 (1944); *Sizemore v. Brady*, 235 U.S. 441 (1941); *Hy-Yu-Tse-Mil-Kin v. Smith*, 194 U.S. 401 (1904); *Leecy v. United States*, 190 Fed. 289 (8th Cir. 1911); *Allotment Selections on The Fort Belknap Reservation*, 55 I.D. 295 (1835); and *Raymond Bear Hill*, 52 I.D. 688 (1929). Since the *Chippewa* case only presents an analogy of the rights *during* the tribe's fifty year term, it is not analogous to the actual rights at issue, thus, it doesn't address the right of the individuals to ultimately receive the property. It does not undermine the allottees right to ultimately possess the mineral estate here at issue.

B. Personal Status

Most other cases cited deal with the *personal status* of the parties, not their property rights per se. (i.e., personal rights and privileges such as citizenship and treaty rights peculiar to Indian persons, or limitations on personal rights such as wardship).

This category may be divided as follows:

(1) *Personal* characteristics (or status) which are *pre-requisites to allotment eligibility*. The following cases fit this category:

LaRoque v. United States, 239 U.S. 62 (1915)[123]

Lowe v. Fisher, 223 U.S. 95 (1912)[124]

Wallace v. Adams, 204 U.S. 415 (1907)[125]

Stephens v. Cherokee Nation, 174 U.S. 445 (1899)[126]

Since the issues in these cases involve *pre*-requisites for allotment eligibility, they address either the allotment process *prior to* any vesting of individual rights, or the Courts' power to re-examine allotment eligibility. Consequently, any principles set forth in these cases have no bearing on the instant case.

(2) Other conditions deal with the Indian's *personal* status as a *ward* of the government. These cases are:

United States v. Jackson, 280 U.S. 183 (1930)

Brader v. James, 246 U.S. 88 (1918)

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[123]In *LaRoque* the Indian died prior selecting an allotment. This decision held that tribal membership terminated upon death. Since tribal membership was also an allotment eligibility pre-requisite, such eligibility terminated upon the Indians' death.

[124]In *Lowe* this Court held the Secretary of Interior could check the tribal enrollment list and exclude persons erroneously enrolled. This decision held that if such personal status were revoked, tribal benefits hinging on this *pre-requisite* could be denied. However, neither *Lowe*, *Wallace* nor *Adams* involved allotment rights.

[125]Both *Wallace v. Adams* and *Stephens v. Cherokee Nation* involve the same basic issue as *Lowe* but the tribal enrollment is cast in terms of citizenship. All these cases reach the same result. (See n. 73).

[126]See n. 124 and 125.

Williams v. Johnson, 239 U.S. 414 (1915)[127]

United States v. Bartlett, 235 U.S. 72 (1914)[128]

Heckman v. United States, 224 U.S. 413 (1912)

Goat v. United States, 224 U.S. 458 (1912)

Tiger v. Western Investment Co., 221 U.S. 286 (1911)

Most cases in this category involve the question of whether Congress can extend the statutory period restraining alienation of trust allotments. These cases are *Tiger v. Western Investment Co., Goat v. United States, Heckman v. United States, Brader v. James,* and *United States v. Jackson.* However, these cases do not involve property rights. Rather, the restraint on alienation is a personal attribute of wardship.

Tiger v. Western Investment Co., is the lead case. In *Tiger*, this Court specifically held that the restraint on alienation was an attribute of the Indian's wardship. Thus, it related to the Indian's personal status as a ward, but was not a property right. Moreover, this Court in *Choate v. Trapp,* expressly noted this distinction and reconciled the results of *Choate* and *Tiger.*

The *Choate* decision stated:

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[127]In *Williams v. Johnson,* the question was the converse of the *Tiger* case. The issue was whether Congress could end the restraint on alienation prior to the original statutory period. This Court held such early termination was legal, again using the *Tiger* rationale that the restraint on alienation was a personal attribute of wardship, not a property right.

[128]*United States v. Bartlett,* held that extending restraints on alienation would not be applied to prejudice the rights of third parties in land held under a fee patent (freed from the restraint on alienation) when the conveyance was prior to the passage of the act extending the restraint on alienation.

> "Nothing that was said in *Tiger v. Western Investment Co.*, . . . is opposed to the same conclusion here. *For that case did not involve property rights,* but related solely to the power of Congress to extend the period of the Indian's disability. The statute did not attempt to take his land or any right, member, appurtenance thereto belonging. It left that as it was." Choate v. Trapp, 224 U.S. 665, 676 (1912). (Emphasis added)

Also the *Choate* decision was quick to add that wardship provided no basis for abrogating property rights.

> "But there was *no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property* which had been vested in the individual Indian by prior laws or contracts. Such rights are protected from repeal by the Fifth Amendment." Id. at 678. (Emphasis added)

Choate, also distinguished the restraint on alienation due to wardship at issue in *Tiger* from the tax exemption/property right as follows:

> "But the *exemption and non-alienability were two separate and distinct subjects.* One conferred a right and the other imposed a limitation. . . . The right to *remove the restriction* was in pursuance of the power under which Congress could *legislate as to the status of the ward and lengthen or shorten the period of disability.* But the provision that the land should be *non-taxable was a property right,* which Congress undoubtedly had the power to grant. That right *fully vested* in the Indians and was binding upon Oklahoma." Choate v. Trapp, 224 U.S. at 667. (Emphasis added)

Thus, the *Choate* decision decidedly spelled out that the restraint on alienation and a property right are

totally different. The restraint on alienation is a personal limitation based on wardship status while the property right is a personal right which may not be diminished due to wardship.

Goat, Heckman, Brader and *Jackson* basically reaffirmed *Tiger.*[129]

Since these cases do not involve property rights they do not support any power in Congress to abrogate individual Indians' rights in their individual property.

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[129]In *Heckman v. United States,* the restraint on alienation was extended prior to the expiration of the restraint, so there was no lapse in the lands' restricted status. Here the court summarily disposed of the alienation issue, expressly relying on *Tiger,* 224 U.S. at 428.

Similarly *Goat v. United States,* affirmed a restraint on alienation for allotments issued to Seminole freedman (ex-slaves who were affiliated with the Seminole Tribe). Again, this decision specified the restraint was not a property right: "The *inalienability* of the allotted lands was *not due to the quality of the interest of the allottee* but to the express restriction imposed." 224 U.S. at 470 (Emphasis added).

Brader v. James, extended the *Tiger* rationale allowing reimposition of the restraint on alienation to apply to land which was unrestricted at the time of the restriction's reimposition. However, since the sale at issue took place after the restraint's re-imposition the purchaser took subject to its requisites.

Later, *United States v. Jackson,* also upheld extending the restraint on alienation, again expressly relying on the rationale of the prior decisions: "That this is within the constitutional power of Congress must be considered as *concluded by our decisions in Marchie Tiger v. Western Invest. Co.... Heckman v. United States....* and *Brader v. James....*" 280 U.S. at 191. (Emphasis added).

C. The "In Praesenti" Grant Problem

Both the Petitioner and the Department of the Interior[130] attach particular importance to the language in *United States v. Rowell,* 243 U.S. 464 (1917) regarding the "in praesenti" grant. This is basically a claim that the statute, without more, is not a conveyance. Rather, further action must be taken for the statute's offer to ripen into a grant, vesting consequent rights.

Initially, as set forth fully elsewhere,[131] the *Rowell* decision, in addressing the issue of a fraud ridden allotment application by a non-Indian, is hardly applicable to the rights at issue. However, *assuming arguendo,* that the "in praesenti" grant argument is applicable, such argument does not defeat the allottee's rights at issue.

The "in praesenti" grant discussion in both *United States v. Rowell,* and *Levey v. Stockslager,* 129 U.S. 470 (1889) at most stand only for the proposition that the statute, taken alone, does not operate as a grant immediately conferring rights on the intended beneficiaries. However, the question remains—what must the intended beneficiary do to ripen this statutory offer into a vested right?

Both the *Levy* and *Rowell* cases involved private bills with issuing procedures peculiar to such private laws.

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[130]Memorandum For The United States at 12.

[131]Any discussion of the "in praesenti" grant problem in *Rowell* is unnecessary dicta because the government could set aside an allotment issued due to mistake or fraud even though a patent had been issued. The *Rowell* case is distinguished at length, infra at V.E.

Consequently, these cases are no help in determining what the applicant must do to render the grant "in praesenti". However, *Sizemore v. Brady*, 235 U.S. 441 (1914) disposes of the "in praesenti" grant problem in the context of the general Indian allotment process. In *Sizemore*, the appellants claimed the Creek allotment act was an "in praesenti" grant.[132] In rejecting this argument, this Court specifically detailed the steps necessary to ripen a statutory offer into vested rights. In rejecting the "in praesenti" statutory grant language this Court stated:

> "On the part of the maternal cousins it is contended that the provisions in the original agreement relating to the allotment and distribution of the tribal lands and funds were in the nature a grant 'in praesenti', and invested every living member of the tribe and the heirs, designated in the tribal laws, of every member who had died after April 1, 1899, with an absolute right to an allotment of lands and a distributive share of the funds, and that Congress could not recall or impair this right without violating the due

[132] *Sizemore v. Brady*, involved a dispute between two heirs of Grayson, a Creek Indian who died before applying for his allotment. Under the intestacy laws in force at the time of Grayson's death, the maternal heirs would inherit. However, before the allotment was chosen on behalf of Grayson's estate, the interstacy laws were amended to favor the paternal heirs. The issue was: Did Grayson's (or his estate's) right in the allotment vest prior to or after the amendment of the intestacy laws? In effort to establish Grayson's rights in the allotment prior to the intestacy laws' amendment, it was necessary for the maternal heirs to claim that the statutory grant *per se* conferred rights in the tribal members "in praesenti", before selection of an allotment.

> process of law clause of the 5th Amendment to the Constitution. To this we cannot assent. There was nothing in the agreement indicative of a purpose to make a grant 'in praesenti'. *On the contrary, it contemplated that various preliminary acts were to precede any investiture of individual rights.*" *Sizemore v. Brady*, 235 U.S. at 449. (Emphasis added)

Thus the statutory rights vest upon a completion of the requisite "preliminary acts".

The decision then specified that the "preliminary acts" were completed upon selecting and applying for the allotment.[133]

> "We have seen that the allotment in question was not *selected or made until* after the supplemental agreement went into effect. The heirs designated in chapter 49 of Mansfield's Digest were therefore the true beneficiaries." Id. at 451. (Emphasis added)

Thus the allotment act ripens into an "in praesenti" grant when the allotment is "selected or made" (selected and applied for) with the consequent vesting of the applicant's rights.

Finally this decision emphasized that once the rights vest, they become immune from Congress' plenary power.

> "The lands and funds to which it related were tribal property, and *only as it was carried into*

[133] While the quote does not expressly state the allottee's rights vest upon the application being "selected or made" such vesting is required by the result of the decision. Again, the issue was: When did Grayson (or his estate) acquire a vested interest in the allotment? This Court, concluded the allotment entered the estate when "selected or made" so Grayson's interest in the allotment vested when the allotment was selected and applied for on behalf of his estate.

effect were individual claims to be fastened upon them. Unless and *until that was done* Congress possessed plenary power to deal with them as tribal property.... In short, the power of Congress was not exhausted or restrained by the adoption of the original agreement, but remained the same thereafter as before, *save that rights created by carrying the agreement into effect could not be divested or impaired.*" Id. at 449-50. (Emphasis added)

As this discussion in *Sizemore v. Brady*, refers to rights of an Indian under a general, tribal allotment system, it is dispositive of any "in praesenti" grant problems posed by the instant case. *Sizemore* concludes that the statute's grant becomes "in praesenti" with the consequent vesting of rights in the allottee upon selection of the land and filing the application. This conclusion is consistent with the explanation of allotment rights presented throughout this brief.[134] Since the Northern Cheyenne allottees all applied for their allotments during the early 1930's the grant of the minerals at issue became "in praesenti" with the Respondent's rights vesting at that time.

D. The "In Lieu" Exchange Of Public Lands Problem

Curiously, in attempting to document its supposed "contract" theory of allotment rights, Petitioner strays into a discussion of the "in lieu" exchange of public lands.[135]

[134]See particularly supra at I.A., & I.C.

[135]Petitioner's Brief at 3.d.

However, the "in lieu" land exchanges cited in this discussion are based on statutory authority,[136] not on

[136]The authority for the "in lieu" exchange involved in *Wyoming v. United States*, 255 U.S. 489 (1920) is the Act of February 28, 1891, 26 Stat. 796 as cited at 255 U.S. at 493 which provides: "....and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, *in lieu* of such as may be thus taken by pre-emption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided*, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands *in lieu* thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township, being fractional, or from any natural cause whatever.' And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each said township, in lieu of sections sixteen and thirty-six therein; but said selections may not be made within the boundaries of said reservations....". (Emphasis added).

The authority for the "in lieu" exchange involved in *Payne v. New Mexico*, 255 U.S. 367 (1920) is also the Act of February

contractual agreement. While the quote cited by Petitioner[137] appears descriptive of a contractual agreement, when read in its context this quote merely states that the non-federal party must apply for the exchange in order for the provisions of the "in lieu" exchange statute to become applicable. Since the authority for these exchanges is statutory rather than contractual, it does not support Petitioner's effort to distinguish *Choate v. Trapp*, by its supposed "contract theory" of public land law. Quite, the contrary, the principle which emerges from both the allotment cases

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28, 1891, 26 Stat. 796, as cited at 255 U.S. at 369 which is quoted above.

The authority for the "in lieu" exchange involved in *Payne v. Central Pacific Ry. Co.*, 255 U.S. 489 (1920) is the Act of July 25, 1866, 14 Stat. 239 as cited at 255 U.S. 232 which provides: ".... there be and hereby is, granted, ... every alternate section of public land, not mineral, designated by odd numbers ... when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies *in lieu* thereof, under the direction of the Secretary of the Interior, in alternate section designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections." (Emphasis added).

These above quoted statutes, rather than any contractual agreement are the authority for the exchanges in each case.

[137]The quote here referred to is in Petitioner's Brief at Sec. 3.d. While the quote is designed to leave the impression of a contractual setting, the Petitioner actually concedes the rights involved are statutory in the preceding paragraph.

and the "in lieu" cases[138] cited is, that in land transfers in which the federal government is grantor–both on reservations and on public lands–the rights of the applicant vest upon filing a sufficient application. Indeed, these "in lieu" exchange cases lend broad support to the allottees' position, for these cases establish that the federal government, as grantor, acknowledges vested rights in applicants for land, be the applicant an Indian allottee, a non-Indian or a State.

This proposition is fully in accord with the explanation of the allotment system as set forth in this brief and further compels recognition of the Respondent/allottees' vested allotment rights.

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[138]In *Wyoming v. United States*, 255 U.S. 489 (1920) land normally appropriated to Wyoming for school purposes was reserved in a natural forest. Consequently, Wyoming filed for its "in lieu" selection. While this application was being processed the "in lieu" land was designated as mineral land. *Despite specific statutory authority permitting withholding mineral land from appropriation*, this Court compelled issuance of the patent noting Wyoming's rights vested upon filing its "in lieu" application.

The facts of *Payne v. New Mexico*, 255 U.S. 367 (1920) parallel the *Wyoming* case. Again this Court denied the Secretary of the Interior's discretion in approving the "in lieu" patent based upon the applicant's rights vesting.

In *Payne v. Central Pacific Fy. Co.*, 255 U.S. 489 (1920) Central Pacific selected "in lieu" lands to replace its normal appropriation from the public domain which was already allocated. Upon filing a proper application the Court again required issuance of the patent over the Secretary of the Interior's objection.

See also *Benson Min.&Smelting Co. v. Alta Min.&Smelting Co.*, 145 U.S. 428 (1892) see also supra. at I.C. which discusses similar cases dealing with Indian allotments.

E. Petitioner's Other Major Authority

Petitioner's claim that *Sweet v. Schock*, 254 U.S. 192 (1917), undermines the decision below is in error. The issue in the *Sweet* case was whether an allotment's tax exemption runs with the land or requires continuing Indian ownership. This case held that when an allotment is *sold to a non-Indian*, the tax exemption ceases. The rationale was that the statute dissolving the tax exemption upon alienation of the land to a non-Indian was passed *prior to* the land sale at issue. Consequently, the purchaser took subject to the statute's terms. This case did not divest any Indian's rights to a tax exemption as Petitioner would have us believe.

Both Petitioner and the Department of the Interior[139] rely heavily on *United States v. Rowell*, 243 U.S. 464 (1917) as a supposed cornerstone for construing allotment acts. This reliance merits examination. Upon such examination the *Rowell* case is neither susceptible to broad application nor applicable to the instant case for the following reasons:

1.–The *Rowell* decision was a response to the procurement of an allotment by Mr. Rowell's *fraud*, hence any language of statutory construction is both dicta and inapplicable to the instant case.

2.–Assuming *Arguendo*, that the vesting issue in *Rowell* has any vitality, application of such rationale to the instant case has been rejected by other decisions of this Court and overruled by later decisions of this Court.

3.–Mr. Rowell was not an Indian. Therefore, the set of policies and consequent rules of statutory construc-

[139]Memorandum For The United States at 12.

tion governing tribal allotment acts are inapplicable to Mr. Rowell's "allotment".

4.–The land involved was not reservation land. Therefore, rules applicable to disposition of "public lands" govern Mr. Rowell's "allotment" rights.

First, the language in the *Rowell* decision is the exception to the rule in construing allotment acts because of its unique fraud-ridden fact setting. Mr. Rowell, a non-Indian residing on the Kiowa Reservation, procured a private bill authorizing the Secretary to issue him an allotment. However, the patent was withheld pending further investigation of Mr. Rowell's application. The resulting Congressional investigation disclosed that Rowell had perpetrated a fraud on Congress in securing this legislation. Indeed Congress, in repealing Mr. Rowell's private allotment act repeatedly characterized Rowell's methods of procuring his allotment as *"fraud"*, *"deliberate misrepresentation"*[140] and

[140]"Mr. Cullop. Mr. Chairman, as I understand it, it is admitted here that this *was procured by fraud.*" 46 Cong. Rec. 155 (1910). (Emphasis added). Also, "Mr. Cooper of Wisconsin. . . . "Three hundred and twenty acres adjoining the land thus given him had been sold for $281,000. And yet we were led into passing the bill, which became a law, giving this Connecticut Yankee 100 acres of land that was *not Indian land at all*, and which he knew was not Indian land when he came here through his friends and *deliberately misled the honorable chairman of the Committee on Indian Affairs*, whose word on this floor I believe. He and his fellow members report unanimously that a *fraud* was perpetrated upon the committee and upon the House. . . . So far as I am concerned, I rely upon the statement of the chairman and of the other members of the committee that a *fraud* was practiced upon them and upon us, and that *the beneficiary must have known it was a fraud.* And any consumptive who could go down there in 1892 and marry and beget four children as expeditiously as he did is not entitled to delay." 46 Cong. Rec. 156 (1910).

"perpetrating this outrage"[141] Mr. Rowell's attorneys even admitted this misrepresentation in their mandamus suit to compel issuance of the patent.[142] The fraud referred to was Mr. Rowell's misrepresenting the value of the land to Congress in procuring passage of his bill. Though Rowell claimed his land was only of average value ($3,000 per allotment) it was actually worth $100,000.00.[143] Additionally, Rowell's family already

[141]"Mr. BURKE of South Dakota. I will say to the gentlemen that my purpose in introducing this bill, that any man who would be a party to what has transpired, leading to the second act of Congress in *perpetrating this outrage*, ought to be punished at least to the extent of having repeated the legislation that enrolled him, which was put upon an Indian appropriation bill and had no consideration by any committee." 46 Cong. Rec. 152 (1910). (Emphasis added).

[142]"Mr. BURKE of Pennsylvania. If the gentlemen will allow me upon what is the demurrer made—upon the nonexistence of law or the absence of authority to make the transfer? .... Mr. BURKE of South Dakota. I will give it to the gentleman so it may go into the Record.... After the title of the case the petitioner in fact, James F. Rowell, says that the answer of the defendant, Richard A. Ballinger, Secretary of the Interior, filed is bad in substance; and the demurrer is signed by Hamilton, Colbert, Yerkes, and Hamilton, attorneys for the petitioner.... Then, among other matters of law to be argued in support of the demurrer is set out the following: That under the law controlling: .... (c) *Any act or word of concealment or misrepresentation even if made to Congress by petitioner can not be set up or relied upon as a defense in this proceeding.*" 46 Cong. Rec. 151 (1910). (Emphasis added).

[143]The $100,000. is based upon the statement of Rep. Burke of South Dakota at 46 Cong. Rec. 150 (1910) and the average value of $3,500 per Kiowa allotment is also a statement of Mr. Burke's at 46 Cong. Rec. 151 (1910). Mr. Burke was the chairman of the Indian Committee which held the hearings on Mr. Rowell's endeavor.

owned 480 acres of Kiowa allotment land.[144] In deciding the *Rowell* decision, this Court specifically relied on these Congressional findings, noting ".... misrepresentation and deception were practiced by Rowell in securing the legislation." 243 U.S. at 467.

Noting Rowell's fraud is essential to properly interpreting this case. Initially such fraud relegates any "vesting" or "in praesenti" language to unnecessary dicta. This is because the government could have set Rowell's allotment aside (even after vesting) if such allotment was procured by fraud or mistake.[145] Consequently, the vesting issue in *Rowell* is wholly irrelevant to the outcome of the case.

Second, assuming the "vesting" discussion as presented in *Rowell* was proper, *Rowell's* result is a narrow exception to the vesting process. Such exception is not applicable to general allotment acts. As discussed elsewhere[146] rights in an allotment vest upon selection of the allotment and filing a proper application. This was set forth in *Sizemore v. Brady*, 235 U.S. 441 (1914) which held that an allotment entered the Indian's estate when it was selected and the application was filed.[147]

Indeed *Sizemore* expressed a rule approved in several prior decisions acknowledging rights in the allottee prior

[144]Statement of Mr. Burke at 46 Cong. Rec. 149 (1910).

[145]*United States v. Southern Pacific Co.*, 251 U.S. 1 (1919) and *Exploration Co. v. United States*, 247 U.S. 435 (1918). Washington Securities Co. v. United States, 234 U.S. 76 (1914); McCaskill Co. v. United States, 216 U.S. 504 (___) and United States v. Minor, 114 U.S. 233 (1885).

[146]Supra at Sec. I.C.

[147]For an explanation see supra at Sec. V.A.

to issuance of the patent. These decisions include: *Mullen v. United States*, 224 U.S. 448 (1912); *Hy-Yu-Tse-Mil-Kin v. Smith*, 194 U.S. 401 (1904); *Elwood v. Flannigan*, 14 Otto 562 (1882); *Crews v. Burcham*, 1 Black 352 (1862); *Doe v. Wilson*, 23 How. 457 (1859); *Leecy v. United States*, 190 F. 289 (8th Cir. 1911); and *Pka-O-Wah-Ash-Kum v. Sorin*, 8 F. 740 (C.C.N.D. Ill. 1881).

Thus, *Rowell* was issued as the exception to a well established rule of this Court.

Also, while *Rowell* was decided after *Sizemore*, it has not been interpreted as overruling *Sizemore*, etc. Indeed, this Court re-affirmed the *Sizemore's* analysis of when allotment rights vest in *Arenas v. United States*, 322 U.S. 419 (1944). In *Arenas* this Court compelled recognition of the applicant's interest in an allotment by requiring issuance of the trust patent over the Secretary of the Interior's objection. By so ruling the *Arenas* decision overruled any broad application of *Rowell* as applied to tribal allotment acts.

Interestingly the *Sizemore-Arenas* rationale of vesting was adopted by the Department of Interior in administering the allotment system.[148] See *Rights of Indians to Allotments In San Juan County*, 57 I.D. 547 (1942); *Allotment System Of The Fort Belknap Indian*

[148]While in the instant case the Department of Interior submits *Rowell* is controlling, such was not the policy "contemporaneous" with administering the allotment system. Viewing this about face on Interior's part, it appears the Department has lost the cutting edge of its administrative expertise since the allotment system was abandoned twenty-six years ago. Perhaps this is the reason for the "contemporaneous" requirement of the "contemporaneous administrative interpretation" rule.

Reservation, 55 I.D. 295 (1935) and *Raymond Bear Hill*, 52 I.D. 688 (1929). Thus the contemporaneous administrative interpretation during the allotment period acknowledged the *Sizemore-Arenas* rationale rather than that of *Rowell*. This contemporaneous administrative interpretation rejecting *Rowell's* as precedent should not be rejected without "cogent and persuasive reasons" *United States v. Jackson*, 280 U.S. 183, 193 (1930). LaRoque v. United States, 239 U.S. 62 (1915). Certainly, the instant case presents no such reason.

Also, at most, *Rowell* only means that rights don't vest until the patent has been issued. As applied to allotment systems this means the trust patent.[149] Since the trust patents at issue were issued during the 1930's even the broadest possible construction of *Rowell* does not defeat the rights here at issue.[150]

Third, Mr. Rowell was not an Indian.[151] This is important because a very different set of policies, hence different maxims of statutory construction apply in construing Rowell's position. Applications of Indian allottees, as wards of the federal government, are viewed with relative favor. Statutes shall "never be

[149]The Department of Interior decision cited herein all acknowledged rights vested under trust allotment rather than upon issuance of the fee patent.

[150]See supra at Sec. I.C.

[151]That Rowell is not an Indian is mentioned several times throughout the legislative history of the act repealing his allotment. 46 Cong. Rec. 149-51 (1910). While the original act giving Rowell the land also authorized the Kiowa Tribe to adopt Rowell, there was no evidence of such adoption, 46 Cong. Rec. 148 (1910) and the act repealing Rowell's allotment also repealed any possibility of his adoption by the Kiowas. 46 Cong. Rec. 151 (1910).

construed to their prejudice" but rather receive "broad construction in favor of the Indian".[152] Consequently, they ". . . . should be construed in such a manner as to confer upon the Indians the full measure of benefit that it was intended to secure to them."[153] These govern interpretation of allotment acts.

However, in Rowell's situation the maxims of statutory construction uniformly run against Rowell, favoring the government. Maxims such as "one may not benefit from a fraud" and terms of the grant are construed "strictly in favor of the grantor/sovereign"[154] unanimously disfavor Rowell.[155] Consequently, the context of statutory construction governing the *Rowell* case is exactly opposite of Indian allotment cases such as the case at bar.

Finally, the land involved in *Rowell* was not reservation land. Rather it was formerly a part of the Arapahoe Reservation (while Rowell laid claim as an "adopted" Kiowa). However, the Arapahoes had ceded the land to the public domain.[156] This is important for two reasons. First, the non-reservation status of the land further distinguishes the rights involved in *Rowell* from those presently before the Court. Second, the

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[152]Squire v. Capoeman, 351 U.S. 1, 7 (1955); Carpenter v. Shaw, 280 U.S. 363, 367 (1929); Choate v. Trapp, 224 U.S. 665, 675 (1912) and Worcester v. Georgia, 6 Pet. 515, 582 (1832).

[153]Starr v. Long Jim, 227 U.S. 613, 623 (1913).

[154]United States v. Grand River Dam Authority, 363 U.S. 229 (1960).

[155]Such grants are also construed most strongly against the grantee. Oregon Short Line R.Co. v. Murray City, 2 Utah 2d 427, 277 P.2d 798 (1954).

[156]46 Cong. Rec. 150 (1910).

public domain status of "Rowell's land" brings the public domain cases cited in this section directly in point.

In consequence, *United States v. Rowell*, has no proper bearing on the instant case.

CONCLUSION

In conclusion, the Respondent/allottees have a constitutionally protected interest in the minerals underlying their allotment lands. Immediate vesting, coupled with delayed possession clearly emerges as Congress' intent upon reviewing the 1926 Act's legislative history. Congress rebelled from the prospect of alloting only the "surface rights"[157] by enacting an "unequivocal and non-contingent"[158] grant of the mineral estate to the allottees. In addition, Congress omitted its "standard form" proviso allowing it to extend tribal possession.[159] The calculated omission of this often used reservation of power can only be ascribed to Congress' design to confer an immediately vesting right.

Congress' "plenary" power over Indian affairs cannot support the divestment before the Court. Such power is

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[157]The original bill disposed of the minerals by requiring a survey and alloting only "surface rights". 67 Cong. Rec. 6522 (1926).

[158]As described by Judge Choy in the decision below at 505 F.2d 268, 271 (9th Cir. 1974).

[159]The allotment acts of the Osage, Crow, Blackfeet, Fort Belknap and Standing Rock and Cheyenne River Indian Reservations provided for a transfer of minerals to the allottees "unless provided by Congress".

"plenary" because derived from a specific constitutional grant.[160] However, the grant of such a constitutional power does not free exercise of that power from other constitutional restraint, i.e., due process. Rather the rule was set forth by Justice Brandeis in *Louisville Joint State Land Bank v. Radford.*

> "The bankruptcy power like the other great substantive powers of Congress is subject to the Fifth Amendment." 295 U.S. 555, 589 (1935).

Accordingly, each constitutionally enumerated power of Congress including war making,[161] taxation,[162] exclusion of aliens,[163] bankruptcy,[164] supervision, regulation of interstate commerce,[165] and enforcement

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[160]U.S. Const. Art. I Sec. 8 cl. 3 as explained as Worcester v. Georgia, 6 Pet. 515 (1832).

[161] Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146 (1919); and Ocho v. Hernandez y Morales, 230 U.S. 139 (1912).

[162]Heiner v. Donnan, 285 U.S. 312 (1931); Blodgett v. Holden, 275 U.S. 142 (1927); Nichols v. Coolidge, 274 U.S. 531 (1926); Barclay & Co. v. Edwards, 267 U.S. 442 (1924); and Boyd v. United States, 116 U.S. 616 (1885).

[163]Wong Wing v. United States, 163 U.S. 228 (1896).

[164]Kuehner v. Irving Trust Co., 299 U.S. 445 (1936) and Louisville Joint Stock Land Bank v. Radford, 295 U.S. 55 (1934).

[165]Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604 (1949); Virginia R. Co. v. System Federation No. 40, 300 U.S. 515 (1936); United States v. Chicago, M.St.P. & P.R.Co., 282 U.S. 311 (1930); United States v. Cress, 243 U.S. 316 (1917); Carroll v. Greenwich Ins. Co., 199 U.S. 401 (1905); United States v. Lynah, 188 U.S. 445 (1902); United States v. Joint Traffic Assn., 171 U.S. 505 (1898) and Monongahela Nav. Co. v. United States, 148 U.S. 312 (1893).

of such fundamental rights as voting[166] are subject to due process limitations. Petitioner offers no *reason why* the regulation of Indian affairs should be so immuned. Indeed no such reason exists.

The mandate provided by the 1926 allotment act was perhaps best expressed by Justice Black in *Federal Power Commission v. Tuscarora Indian Nation,* "great nations, like great men, should keep their word."[167] The 1926 act promised these people possession of their minerals in 1976. This Court is left to fulfill that obligation.

Consequently, this Court should affirm the Ninth Circuit's decision below, setting aside the 1968 amendment[168] as violative of due process.

Respectfully submitted,

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[166]Hannah v. Larche, 363 U.S. 420 (1960).

[167]362 U.S. 99, 142 (1960) (dissenting opinion).

[168]Act of July 24, 1968, 82 Stat. 424.

Supreme Court, U. S.
FILED
JAN 12 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-145

THE NORTHERN CHEYENNE TRIBE,

Petitioner,

v.

WILLIAM HOLLOWBREAST, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT CLASS OF NORTHERN CHEYENNE INDIANS

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January, 1976

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
ISSUES	2
PIVOTAL ISSUE	2
RESPONDENT'S POSITION	3
LITIGATION HISTORY	3
LAW AND ARGUMENT	5
1. Introduction	5
2. Treaty Legislative and Historical Background	7
3. The significance of the Treaty of 1868	11
4. The Act of June 3, 1926	18
5. Is the Statute of June 3, 1926 (44 STAT. 690) ambiguous, or of an Obscure or Doubtful Meaning?	22
6. Assuming the Statute to be ambiguous, should the ambiguity be resolved in favor of the Respondent class of Allottees, Heirs and Devisees?	23
7. What is the significance of Indian lobbying?	26
8. Definitions	28
9. Plenary Powers of Congress Not Absolute	32
10. Violation of Fifth Amendment and Choate v. Trapp	35
SUMMARY AND CONCLUSION	41
APPENDICES:	
Appendix A – Treaty between The United States of America and the Northern Cheyenne and Northern Arapahoe Tribes of Indians	1a
Appendix B – Appropriations for Northern Tribes Analysis of GAO Report	1b
Appendix C – Corporate Charter of the Northern Cheyenne Tribe of the Tongue River Reservation Montana	1c

TABLE OF AUTHORITIES

Page

Cases:

Adams v. Osage Tribe of Indians, 59 F.2d 653 . . . 15, 24, 40, 41

Allotment sections on The Fort Belknap Indian Reservation, 55 I. D. 295 21

Andrews Bros. Co. v. Youngstown Coke Co., 86 F. 585 25

Antoine v. Washington, 420 U.S. 194 . . . . . 15, 39, 42

Arenas v. U.S., 322 U.S. 419 21

Benson Mine & Smelting Co. v. Alta Mine & Smelting Co., 145 U.S. 428 21

Brader v. James, 246 U.S. 88 34

British-American Oil Producing Co. v. Board of Equalization, et al., 299 U.S. 159 . . . . . 24, 41

Butschkowski v. Brecks, 94 Neb. 532 14

Carpenter v. Shaw, 280 U.S. 363 36

Cf. F. H. A. v. Darlington, Inc., 358 U.S. 84 39

Chase v. U.S., 222 Fed. 593 40

Chase Jr. v. U.S., 256 U.S. 1 . . . . . 32, 40

Chippewa Indians v. U.S., 301 U.S. 358 34

Cherokee Nation v. Hitchcock, 187 U.S. 294 15

Cherokee Intermarriage Cases, 203 U.S. 76 15

Choate v. Trapp, 224 U.S. 665 . . . . . *passim*

Cincinnati v. Vester, 281 U.S. 439 36

Commissioner of Internal Revenue v. Kellog, CCA. 3, 119 F.2nd 54 29

Congdon v. Congdon, 160 Minn. 343 25

County of Mahnomen v. U.S., 319 U.S. 474 36

Crook v. Commonwealth, 47 Va. 593 23

Danzer Co. v. Gulff R. R., 268 U.S. 633 38

Dartmouth College v. Woodward, 4 Wheat. 518 25

De La Rama S. S. Co. v. U.S., 344 U.S. 386 39

Duncan Townsite Co. v. Lane, 245 U.S. 308 33

Page

English v. Richardson, 224 U.S. 680 . . . . . 36, 40

Fairchild v. St. Paul, 46 Minn. 540 37

Forest City Mfg. Co. v. International Ladies, et al., 233 Mo. app. 935 25

Froelich and Kuttner, of Manila, P. I. v. Sutherland, 57 app. D.C. 294 25

Fulton Light, Heat & Power Co., v. State, 65 Misc. Rep. 263 30

Galway v. Elevated Railway, 128 N.Y. 132 37

Gleason v. Wood, 224 U.S. 679 36

Goat v. U.S., 224 U.S. 458 34

Gritts v. Fisher, 224 U.S. 640 . . . . . 15, 32

Hickman v. U.S., 224 U.S. 413 34

In Re Clark's Estate, Orph., 13 N.J. Misc. 393 29

In Re Crown Heights Hospital, 183 Misc. 563 25

In Re Kelly's Estate, 167 Misc. 751 29

In Re Whiting, D. C. N. C., 3 F.2d 440 29

Johnes v. Meehan, 175 U.S. 1 40

Lone Wolf v. Hitchcock, 187 U.S. 553 14

Louisville & N. R. Co. v. Scott, 133 Ky 724 14

Lowe v. Fisher, 223 U.S. 95 33

Lynch v. U.S., 292 U.S. 571 39

McAllister v. Pritchard, 230 S.W. 66 30

McGillis v. McGillis, 11 app. Div. 359 28

McMannis v. Peerless Casualty Co., 114 Me. 98 29

Morrison v. Work, 266 U.S. 481 33

Morrow County Auditor, et al. v. U.S., 243 Fed. Rep. 854 40

Mott v. U.S., 283 U.S. 747 . . . . . 21, 36

Nadeau v. Union Pacific Railroad, 253 U.S. 442 32

Nebraska Wheat Growers Assn. v. Smith, 115 Neb. 177 25

	Page
Nobel v. Union River Logging R. R., 157 U.S. 165	38
Northern Cheyenne Tribe v. William Hollowbreast, et al., 505 F.2d, 268 and 59 F.2d 654	
Old Dominion Co. v. U.S., 269 U.S. 55	36
Oklahoma Tax Comm. v. U.S., 319 U.S. 598	36
Orthwein v. Germania Life Ins. Co., of City of N. Y., 261 Mo. 650	28
Painter v. Herschberger, 340 Mo. 347	29
Payne v. New Mexico, 255 U.S. 367	21
Perry v. U.S., 294 U.S. 330	39
Porter v. Railroad Co., 76 Ill. 573	25
Pronovorst v. U.S., 232 U.S. 487	14
Ralston Steel Car Co. v. Ralston, 112 Ohio St. 306	30
Raymond Bear Hill, 52 I.D. 688	21
Right of Indians to allotments in San Juan County, Utah, 57 I.D. 547	21
Rindge Co. v. Los Angeles, 262 U.S. 700	36
Scott v. West, 63 Wisc. 529	28
Sizemore v. Brady, 235 U.S. 441	15, 32, 36, 39, 40
Smith v. Proskey, 39 Misc. 385	28
State v. Thistle Down Jockey Club, 114 Ohio St. 582	25
Stephens v. Cherokee Nation, 174 U.S. 455	15, 33
Story v. First National Bank & Trust Co., et al., 115 Fla. 436	29
Sweet v. Schock, 245 U.S. 192	34
Taylor v. Tayrien, 51 F.2d 884	41
Tiger v. Western Investment Co., 221 U.S. 286	34
U.S. v. Alcea Bank of Tillamooks, et al., 329 U.S. 40	33, 34
U.S. v. Arenas, 158 F.2d 730	21

	Page
U.S. v. Bartlette, 235 U.S. 72	34
U.S. v. Peter Bruisehead, et al., Civil No. 2515	14
U.S. v. Causby, 328 U.S. 256	37
U.S. v. Gettysburg Electric Ry., 160 U.S. 668	36
U.S. v. Jackson, 280 U.S. 183	34
U.S. v. Jim, 409 U.S. 80	32
U.S. v. Rowell, 243 U.S. 464	32
U.S. v. Santa Fe R. Co., 314 U.S. 339	16
U.S. v. Schooner Peggy, 1 Cranch 103	14
U.S. v. Seminole Nation, 299 U.S. 417	14
U.S. v. Thomas, 151 U.S. 577	32-33
U.S. v. Trinidad Coal Co., 137 U.S. 160	25
U.S. ex rel Turner v. Fisher, 222 U.S. 204	33
U.S. ex rel T. V. A. v. Welch, 327 U.S. 546	36
Ward v. Love County, 253 U.S. 17	36
Wallace v. Adams, 204 U.S. 415	15, 33
Williams v. Johnson, 239 U.S. 414	34, 36
Wiseman v. Madison Cadillac Co., 191 Ark. 1021	23
Worchester v. Georgia, 6 Pet. 515	16
Wyoming v. U.S., 255 U.S. 489	21
No. 75-7366 pending before this High Court	16
Constitutional Provisions:	
U.S. Constitution art. 6	14
U.S. Constitution amendment V	*passim*
Treaties:	
Treaty of 1851 (11 Stat. 749)	12
Treaty of 1868 (15 Stat. 655) (See appendix A; A-1 to A-7 in toto.)	*passim*
Statutes:	
1 Stat. 50, 52 (Ordinance of 1787)	17
16 Stat. 544 (Congressional Control)	17

	Page
24 Stat. 388 (Dawes Act)	9
34 Stat. 539 (Osage Act)	6, 20
35 Stat. 460 (Standing Rock, et al., Act)	20
41 Stat. 17 (Blackfeet)	20
41 Stat. 751 (Crow)	6, 20
41 Stat. 1355 (Fort Belknap)	6
43 Stat. 253 (Citizenship for Indian)	9, 42
44 Stat. 690 (Northern Cheyenne)	*passim*
48 Stat. 984 (Wheeler-Howard)	11, 17, 21, 23-24
49 Stat. 378 (Amend. to W.H.)	11
73 Stat. 565 (Amend. to Crow)	6, 20
82 Stat. 424, 425 (Amend. to Cheyenne)	3, 11, 35, 37, 43
25 U.S.C. 396	39
Miscellaneous:	
President Chester A. Arthur's Executive Order of November 26, 1884. (Vol. 1 of, "Indian Affairs Laws and Treaties," of Charles J. Kappler at page 860.)	8, 14, 15, 41
President McKinley's Executive Order of March 19, 1900. (Kappler, cited supra., pages 860, 861.)	8, 41
1 Op. atty. Gen. 465 (Wirt)	16, 42
Atty. Gen. Stone Op. (May 27, 1924)	10
C.F. Memo Sol. I.D. July 1, 1936	10
"Black's Law Dictionary", Revised Fourth Edition P.P. 409 - 412	25
"Black's Law Dictionary," Revised Fourth Edition (1968)	
Page 1734	28
Page 1735	29
Page 1382	30
Page 1383	30
Page 1486, 1487	30, 31

	Page
"The Oxford English Dictionary," Vol. XII, reprint 1961	
Page 160	28
Page 1471	29
Page 669	30
"Federal Indian Law," P. 648 (3rd Ed. 1966)	12
"Handbook of Federal Indian Law", (1945 by Cohen, P. 51-66	16
"History of the Allotment Policy," by D.C. Otis	9
"Jones on Evidence," Sixth Edition section 2:22 et seq.	23
Congressional appropriations G.A.O. Report, Pet. Ex. 113 (see also appendix B-1.)	41
Corporate Charter of the Northern Cheyenne Tribe of the Tongue River Reservation Montana (See appendix C; C-1 to C-7 in toto.)	25
The Columbia Encyclopedia, Vol. 6, Page 1674	7
"My Friend, the Indian," by J. McLaughlin, 81 (1963 Ed.)	8
"A Continent Lost a Civilization Won," by J.P. Kinney's study	9

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals No. 73-1545 is reported at 505 F.2d 268 (1974); and the opinion of the District Court for the District of Montana is reported at 349 F. Supp. 1302 (1972).

ISSUES

1. Whether or not the respondent class and their predecessors in interest received a vested property right in the minerals in and under their respective allotments, which is protected by the Fifth Amendment of the United States Constitution, by virtue of the act of June 3, 1926 (44 STAT. 690) as amended;

2. Whether or not the respondent class is entitled to the revenues received by the petitioner by virtue of the execution of leases and prospecting permits covering the minerals in and under their respective allotments;

3. Whether or not the petitioner is liable to the respondent class for damages done to the surface of their respective allotments by the permittees and lessees of the petitioner in exploring for mineral deposits, in and under said allotments; and,

4. Whether or not the respondents are entitled to an injunction to enjoin the petitioner and its permittees and lessees from going upon their respective allotments for the purpose of exploring for mineral deposits.

PIVOTAL ISSUE

It was held that all of the above issues cited heretofore herein are collateral, ancillary and dependent upon one central pivotal issues:

Did the respondent class of Northern Cheyenne Indian allotees, heirs and devisees receive a vested property right in the *minerals in and under their respective allotments*, which is protected by the Fifth Amendment to the U.S. Constitution, by virtue of the Act of June 3, 1926 (44 STAT. 690), as amended, or

by virtue of the Treaty of 1868 (15 STAT. 655) or both.

These were and are the issues in the case at bar, and the pivotal issue, it is pristine clear, is a pure question of law.[1]

RESPONDENTS' POSITION

It is the respondents' position that they do have a vested property right in the minerals, beneath *their allotments* by virtue of the Act of June 3, 1926, (44 STAT. 690) as amended, protected by the Fifth Amendment to the U.S. Constitution, and or, also, by virtue of the Treaty of 1868 (15 STAT. 655), and further, that the Ninth Circuit Court of Appeals was correct in so mandating.

LITIGATION HISTORY

The Northern Cheyenne Tribe, Inc., at the direction of Congress[2] brought this action in the District Court under a special grant of jurisdiction against respondents, individual owners, and class respresentatives of all allottees, their heirs and devisees, *owning allotments of land* within the exterior boundaries of the tribal reservation on or about July 2, 1970.

At stake are the rights to the mineral deposits contained in and beneath *these allotted lands*. In 1968,

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[1] See District Courts Order below of May 30, 1972, pages 4 and 5.

[2] Act of July 28, 1968, 82 Stat. 424, 425.

Congress attempted to reserve these deposits in perpetuity for the benefit of the tribal corporation, provided the tribal corporation institute this suit:

> "... to determine whether under the provisions of the Act of June 3rd, 1926 (44 STAT. 690), as amended, the allottees, their heirs or devisees have received a vested property right (in the minerals) which is protected by the Fifth Amendment ..."

to the United States Constitution. (Insert supplied; Act of July 28, 1968; cited supra).

The District Court held that no property rights were received and awarded judgment, including all prospecting permit and lease moneys, to the tribal corporation on or about September 29, 1972. Rehearing was denied to the respondents on or about November 28, 1972.

Respondent class timely appealed and the U.S. Court of Appeals for the Ninth Circuit reversed and remanded on October 17, 1974.

Petitioner, which had been represented by the Tribal attorney, Bert W. Kronmiller of Hardin, and Messrs. Longan & Holmstrom, of Billings, Montana, substituted the present opposing counsel who filed an untimely petition for rehearing on February 28, 1975, with the Court's permission. The petition itself was later denied on April 28, 1975.

Extensions of time were granted by Justices of this High Court to petitioner within which to file its petition for writ of certiorari first on December 28, 1974, extending the time to March 1, 1975, and second, on February 19, 1975, extending the time to March 16, 1975.

The petition for writ of certiorari followed to this High Court which was granted October 14, 1975.

Again an extension of time was granted to petitioner, in this instance, to file his brief on the merits, up to and including December 12, 1975.

This brief is offered in opposition to petitioner's brief and prayer for relief therein.

LAW AND ARGUMENT

1. Introduction

With all do respect for the petitioner, after having plodded through its brief, I cannot help but comment that those who have the least to say contrive to spend the most time in saying it.

The arguments advanced appear to cover the entire legal spectrum of forensic eloquence, from Constitutional law to contract, from Congressional intent to Indian lobbying, from Governmental policies to a history of the Northern Cheyenne Tribe, from the plenary powers of Congress to the destitute condition of the Tribal corporation, and finally to the National energy crises.

One finds it, in deed, bewildering when in the presence of this herculean effort, if the dispute involves a single pivotal issue of law!

In all of the petitioner's expounding, theorizing, conjecturing, and further presenting its contentions, the one open obvious and notoriously glaring omission in this treatise as submitted, is the failure to recognize, explain and otherwise treat adequately, the absence of the similarly qualifying phrases in the Northern Cheyenne allotment act that appear in the Crow, Osage and Fort Belknap Acts, *all passed prior to the Northern Cheyenne Act.*

This intentional omission by the U.S. Congress, of the similar qualifying phrases, such as "... *unless otherwise ordered* by Congress...",[3] (Emphasis Supplied) following the grant of the mineral estate which appears in other allotment acts, is the expressed intent of the Congress, to surrender and pass to, and vest in, the allotees an unequivocable and unrevokable fee simple estate in the minerals, subject only to the term of years in the tribe. In addition, the petitioner is noticeably silent as to the provisions of the historical Treaty of May 10, 1868,[4] which originally was intended to convey allotments, including the minerals to the individual indians.

These omissions coupled with the failure or refusal of the petitioner to recognize the difference between tribally owned land and allotted land are certainly determining factors in its failure to carry its burden of proof.

The many new and additional questions and issues now first raised by petitioner at this late date, present an attack on far too wide a front, as a review by this High Court of the rolls and records of this case in the lower Courts, will disclose, they were not raised at that time at those levels, and cannot, and should not, respondents respectfully submit, be considered now.

Therefore, even though much of the petitioner's presentation has no application to the case at bar, the respondents shall once again rebut, and also limit within

[3] Crow Allotment Act, of June 4th, 1920, 41 Stat. 751, as amended, 73 Stat. 565 in 1959; Osage Allotment Act, of June 28th, 1906, 34 Stat. 539; Fort Belknap Allotment Act, of March 3, 1921, 41 Stat. 1355.

[4] Treaty of May 10th, 1868 (15 Stat. 655) will be treated later herein more extensively.

reason, the legitimate arguments pertaining essentially and substantially to the pivotal issue.

2. Treaty, Legislative and Historical Background

The natural band, or tribe of Northern Cheyenne Indians surrendered and laid down their arms against the U.S. Armed Forces and accepted in return, the provisions of "The Treaty with the Northern Cheyenne and Northern Arapaho", signed May 10, 1868 (15 Stat. 655), ratified by Congress July 25, 1868, and proclaimed August 25, 1868, (see appendix A-1 through A-7). There was offer, acceptance, consideration, a meeting of the minds, agreement and there was a legally binding and valid treaty. Although it may be contended by some few, that since hostilities subsequently continued,[5] the treaty was invalidated, it can and is contended by the greater majority, that the Indian Wars that erupted were because of broken White promises.[6] The resultant banishment to Oklahoma, and the trail of tears of the "Morningstar People" to reclaim their Montana lands promised to them in that 1868 Treaty is admittedly, a shameful historical fact.

[5] The Northern Cheyenne, together with the Sioux, defeated Lieutenant Colonel Custer at the Battle of the Little Big Horn on June 25th, 1876.

[6] Lieutenant Colonel Custer massacured the Cheyenne, including women and children, and their allies at the battle of Washita, *November 1868*, and then in 1874 Custer commanded the expedition into the Black Hills which led to renewed hostilities with the Sioux, and finally to the Battle of the Little Big Horn, 1876. (The Columbia Encyclopidea, Vol. 6, Page 1674).

In that 1868 Treaty, land both *tribal* and *allotted* were promised to the Northern Cheyenne Indians, and the land itself was designated as a "*permanent reservation*", and was given to the natural band or tribe in return for their surrender of all other claims to all other lands and territories.[7]

The Northern Cheyenne reservation was then reconfirmed and circumscribed and set out in greater detail by President Chester A. Arthur's Executive Order of November 26, 1884. (Vol. 1 of Indian *Affairs, Laws and Treaties*, of Charles J. Kappler at Page 860).

The reservation was later enlarged by President McKinley's Executive Order of March 19, 1900. (Kappler, cited supra, pages 860 - 861).

None of these aforementioned documents, not the treaty or the two executive orders, reserved any of the minerals beneath the *allotments* or the tribal lands to the tribe, or to the U.S. Government.

The Cheyennes had been, for as long as history records, a proud, fierce aggressive warrior-like tribe and accustomed to a nomadic existance.[8]

They did not think of land as being capable of ownership, but rather they thought of the earth as their Mother from whom they drew sustenance.[9]

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[7] "Art. 3. If any individual belonging to said tribes of Indians . . . *he shall have the privilege to select, . . . a tract of land within the reservation* not exceeding *three hundred twenty acres* . . . but the same may be occupied *and held in the exclusive possession of the person selecting it, and of his family* . . ." (See Treaty of 1868 cited supra., emphasis supplied, 15 Stat. 655; Art. 2 et seq.) (appendix A-1 through A-7).

[8] J. McLaughlin, My Friend, the Indian, 81 (1963 ed.).

[9] Cited supra, et seq.

The Cheyenne suffered intolerable hardships in adjusting to a sedentary type of existance on the reservation.[10]

Nevertheless, beginning with that infamous 1868 Treaty and continuing through to the year 1934 at least, the primary governmental policy toward the Indians, and more specifically to the Cheyennes, was to give to the individual, a tract of land in fee simple, in the hope that he would pursue an agrarian existance as did most whitemen. (See Treaty, cited supra in toto appendix A-1 to A-7).

The pronounced purpose of the U.S. Congress in 1887 when the *General Allotment Act*, (Dawes Act, 24 Stat. 388.) was passed, was in short, to do away entirely with tribal lands and issue a patent in fee to the individual Indians with only a restriction on alienation for twenty five (25) years. (See Dawes Act, cited supra; and also, J.P. Kinney's Study. "*A Continent Lost a Civilization Won*", and also, "*History of the Allotment Policy*", by D.C. Otis.)

In any event, "*A Bill Granting Citizenship to Indians, and for other Purposes*", (43 Stat. 253, 8 U.S.C. 3) of June 2, 1924, removed any and all doubt, if any had theretofore existed, that the Indian was

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[10] Cited supra, et seq.

entitled, just like all other citizens to his constitutional rights and protections.[11]

Under the foregoing authorities, it must be concluded that Indian title to the minerals is valid as against Federal administrative agencies, Acts of Congress, and as well as against private parties or tribal corporations. (See C.F. Memo Sol. I.D. July 1, 1936, also, – holding Government officials are not authorized to mine coal in the Navaho Reservation without consent of the Indians.)

On June 3, 1926, "*An Act to Provide for Allotting in Severalty Lands within the Northern Cheyenne Indian Reservation in Montana, and for other Purposes*", became law. (44 Stat. 690).

It is indisputable therefore, that the reservation of the minerals, including oil and gas, and other natural deposits to the tribe for a mere term of fifty (50) years, in Section 3 thereof, referred to the natural band or tribe of North American Aboriginies, collectively composing the Northern Cheyenne Tribe at the time, *who for the most part are the respondent class in this*

[11]I think nothing makes the intent and motive of Congress more clear, except the 1926 Act itself, than to quote herein Attorney General (afterwards, Justice) Stone's opinion rendered on *May 27, 1924,* just a few days before citizenship was conferred on the Indian, with reference to the proposal of Secretary of the Interior, Fall, to open Executive order reservation of lands to mineral entry, under the laws governing minerals within the public domain. After indicating these general mining laws would have no application on Indian Reservation lands, he declared: "*. . . these treaty provisions for the allotment of reservation lands all contemplate the final passing of a perfect fee title to the individuals of the tribe, and that meant, of course, that the minerals and all other hidden or latent resources go with the fee*". (Emphasis supplied)

action. It could not have possibly meant the tribal corporation.[12]

Subsequently, on July 24, 1968, Public Law 90-424,[13] an amendment to the 1926 Act became law, the constitutionality of which is here now in question, attempting to reserve in "*Perpetuity*"[14] the minerals to the tribal corporation.

Respondents contend this was an act of naked confiscation.

3. The Significance of the Treaty of 1868[15]

The question of whether or not the allottees, their heirs or devisees of the Act of June 3, 1926, 44 Stat 690, received a vested property right in the minerals beneath their respective allotments must be considered in light of the treaties, statutes and language peculiar to that particular grant. It has been repeatedly correctly stated:

> "Whether a possessory right of an Indian Tribe includes minerals depends, as does every other question relating to the extent of Indian

[12]The natural band or tribe of Northern Cheyenne Indians did elect to become a Federal Tribal Corporation *by a majority of the minority voting* under the Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935, (49 Stat. 378) and finally ratified November 7, 1936. (See also, pages 11 and 12 of the respondents' brief in the District Court in support of the respondents' cross-claims and counter-claims, as submitted May 2, 1972), and appendix C-1 thru C-7).

[13]82 Stat 424, 425.

[14]82 Stat 424, 425 (cited supra).

[15]15 Stat 655 (cited Supra).

possessory rights upon *treaty, statute, executive order* or other document or course of action upon which the right is based.[16]

(Emphasis supplied)

The Northern Cheyenne Indians were granted certain rights and privileges by virtue of the Treaty of Fort Laramie with the Sioux, Act of September 17, 1851.[17] However, the specific treaty provisions between the Northern Cheyenne Indians and the United States are set forth in the Treaty of Fort Laramie with the Northern Cheyenne and Northern Arapaho, Act of May 10, 1868, 15 Stat 655. (See appendix A-1 through A-7).

One such provision permitted an individual belonging to the tribe to select a tract of land not larger than three hundred twenty (320) acres for the purpose of farming. The language of that provision is as follows:

"Article 3. If any individual belonging to said Tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservations not exceeding *three hundred and twenty acres* in extent, which tract, when so selected, certified and recorded in the *'Land Book'* as herein directed, shall cease to be held in common, but the *same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it".*

(Emphasis Supplied)

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[16] *Federal Indian Law,* P. 648 (3rd Ed. 1966).

[17] 11 Stat 749.

"Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding *eighty acres* in extent, and thereupon be entitled to the *exclusive possession* of the same as above directed."

(Emphasis Supplied)
(Cited supra)

Reasonable and prudent men everywhere would agree that the term *"exclusive possession"* as used in the treaty could only mean the government intended to pass a fee simple title to the individuals selecting allotments, and to the tribe in the lands held in common.[18] The same interpretation must be made of the words *"permanent Home"* and *"permanent reservation"* and *"will attach themselves permanently"*[19] (Emphasis Supplied).

At this juncture in time, with the Court's indulgence, I would like to quote the Honorable Senior District Judge Jameson himself, (who ruled against respondents at the District Court level), who himself,

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[18] 15 Stat 655, cited supra, Art 2, et seq.

[19] *"Article 2.* The Indians, parties to this Treaty, hereby agree to accept for their *permanent home* some portion of the tract of country set apart and designated as a *permanent reservation* for the Southern Cheyenne and Arapaho Indians by a Treaty entered into by and between them and the United States, at Medicine Lodge Creek, on the day of October, Eighteen Hundred and Sixty Seven .... and the Northern Cheyenne and Arapaho Indians do hereby relinquish, release and surrender to the United States, all right, claims and interest to all territory outside the two reservations above mentioned except the right to roam and hunt .... And they do solemnly agree that they will not build any permanent homes outside of said reservations, and that they *will attach themselves permanently* ...."

(Emphasis Supplied)

(See 15 Stat 655, Art 2, et seq)

on January 7, 1966, in the case of *United States of America v. Peter Bruisehead and Genevieve Bruisehead, his wife, Ethel Leech and A. E. Leech Company, a Montana corporation,* Civil No. 2515, declared:

> *"Obviously in the absence of a restriction or a reservation a fee simple patent covers the minerals as well as the surface rights."*[20]
>
> (Emphasis Supplied)

There were no restrictions or reservations of the minerals to the United States, or to the tribe in the treaty of 1868 (cited supra) or in the executive orders of November 26, 1884, (cited supra), or of March 19, 1900 (cited supra). Failure to reserve the minerals, the United States conveyed them. Courts have repeatedly held that with regard to formal treaties:

> "... all treaties made or which shall be made under the authority of the United States shall be the supreme law, of the land and the judges in every state shall be bound thereby anything in the constitution or laws of any state to the contrary notwithstanding."
>
> (Emphasis Supplied)[21]

Treaties like agreements, can be modified,[22] except that rights created by carrying the agreement into effect

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[20]The Court made this pronouncement in interpreting the Flathead Statute that reserved the minerals to the tribe.

[21]*Pronovost v. U.S., 232 U.S.* 487, 58 L.Ed. 696, 34 S.Ct. 391; *U.S. v. the Schooner Peggy,* (U.S.) 1 Cranch 103, 2 L.Ed. 49; *Louisville & N.R. Co. v. Scott,* 133 Ky. 724, 118 S.W. 990, Affd. 219 U.S. 209, 55 L.Ed. 183, 31 S.Ct. 171; *Butschkowski v. Brecks,* 94 Neb. 532, 143 N.W. 923, U.S. Const. Art. 6.

[22]*United States v. Seminole Nation,* 299 U.S. 417, 428, (1937) and *Lone Wolf v. Hitchcock,* 187 U.S. 553, 564-67.

cannot be impaired.[23] (Emphasis Supplied) Although all attempts by respondents to locate the *"land Book"*[24] referred to in the Treaty have been thwarted, none the less, it has been conclusively established that it was the intent of the Government to pass a fee simple estate in the reservation, including the minerals to the individuals, and to the tribe. The words of the Treaty must be construed as illiterate people would understand them.[25] But of even greater significance is the ratification of this treaty by President Chester A. Arthurs's Order of November 26, 1884, circumscribing in greater detail the reservation. It is respondents' contention that this was a valid ratification by executive proclamation after hostilities had ceased, of the original 1868 treaty and in support thereof, cite *Antoine v. Washington,* 420 U.S. 194, 43 L.Ed. 2d 129, 95 S.Ct. 944, 43 U.S. L.W. 4257, decided February 19, 1975.

Mr. Justice Douglas concurred in that case and wrote the opinion that a grant of rights to Indians, *"on an equal footing with other citizens of the United States, ..."* had been ratified, and that a treaty like a statute, was the supreme law of the land. (Cited supra)

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[23]*Choate v. Trapp,* 224 U.S. 665, 671 (1912), *Gritt v. Fisher,* 224 U.S. 640, 648 (1912), quoted with approval in *Sizemore v. Brady,* 235 U.S 441, 450 (1914), *Cherokee Intermarriage Cases,* 203 U.S. 76, 93. *Stephens v. Cherokee Nation,* 174 U.S. 445, 488; *Cherokee Nation v. Hitchcock,* 187 U.S. 294; *Wallace v. Adams,* 204 U.S. 415, 423 (P. 648) Amended V U.S. Const.

[24]15 Stat 655 in Art 3, (Cited Supra).

[25]"Treaties and legislative acts relative to Indians should be construed as illiterate people would understand them." Adams et al v. Osage Tribe of Indians, 59 F2d 653 (C.A. 10th (1932), cert. denied 287 U.S. 652, 77 L.Ed. 563, 53 S.Ct. 116.

and, also see respondents' brief submitted in this same term of Court Case No. 75-5366, presently still pending. Also, Acts of appropriations by Congress under Treaty of 1868 constitutes other ratifications by the Congress. (See appendix B-1.)

Whenever there has been a *Governmental recognition* of the Indians right to occupy lands, they have a right of occupancy which cannot be taken from them without just compensation. As early as 1821, 1 Op. Atty. Gen. 465, 466 (William Wirt) stated:

> *"The conquerors have never claimed more than the exclusive right to purchase from the Indians . . . "*
>
> (Emphasis Supplied)

Then in 1832, in Worchester v. Georgia, 6 Pet. 515, 543, 544, 547, 8 L.Ed. 483, Justice Marshall declared:

> "It is difficult to comprehend the proposition . . . that the discovery . . . should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors . . . *It gave the exclusive right to purchase,* but did not found that right on a denial of the right of the possessor to sell . . . *The king purchased their lands . . . but never coerced a surrender of them."*
>
> (Emphasis Supplied)

Again in 1941, in *United States v. Santa Fe R. Co.*, 314 U.S. 339, 356, 62 S.Ct. 248, 256, 86 L.Ed. 260, the Court again mandated:

> "In our opinion, taking *original Indian Title without compensation* and without consent does not satisfy the *'high standards for fair dealing' required of the United States* in controlling Indian Affairs."
>
> (Emphasis Supplied)[26]

[26]See also the Analysis in Cohen, *Handbook of Federal Indian Law* (1945) P 51-66.

It is also evident that long before the end of the Treaty system of Indian Government and the advent of legislative control in 1871 (16 Stat 544) Congress had evinced its own attitude toward Indian Relations. In support of this proposition the Ordinance of 1787 recited:

> *" . . . the utmost good faith shall always be observed toward the Indians; their land and property shall never be taken from them without their consent."* (1 Stat 50, 52)
>
> (Emphasis Supplied)

It is indisputable that even when original Indian Title to land was taken, compensation was to be paid, to say nothing of private rights in allotments given by solemn treaty to individual Indians.

But let us again examine the Treaty itself and quote verbatim Article 8 thereof:

> "No treaty for the cession of any portion of the reservation herein described, which may be held in common, shall be of any force or validity as against said Indians *unless executed and signed by at least a majority of all adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive without his consent, any individual member of the tribe of his right to any tract of land selected by him as herein before provided."*
>
> (Emphasis Supplied)

It is the respondents' contention that the above treaty provision[27] was *not complied with* when the Tribe attempted incorporation under the *Wheeler-Howard Act* of June 18, 1934 (48 Stat 984) according to the certificate of referendum election when the votes for ratification were cast,[28] there were only 529 votes cast out of only 744 eligible voters.

[27]Treaty of 1868, cited supra, Art. 8.

[28]November 7, 1936 (corporate charter Northern Cheyenne) see Appendix C-7.

The official count of these votes were as follows:

Votes in favor or the acoption of charter	448
Votes opposed to adoption of charter	73
Votes rejected as illegal or spoiled	8
Total cast	529

There is no way this figure could possibly represent *"a majority of all adult male Indians occupying or interested in the same . . . "*[29] as petitioner admits in his brief, there are 3,600 enrolled members.[30]

The votes cast included also, male and *female votes* and assuming that as much as two-thirds (2/3), were male, it represents *only about 298 male voters.*

Therefore, even allowing for births and deaths, this figure could not represent a majority of adult males in *November 1936,* and therefore, *no lands could have been ceded to the tribal corporation, and certainly the tribal corporation could not have received any mineral estate.* In addition, respondents hasten to add that none of these figures include *unenrolled* Cheyennes who may be *"interested".* (Cited Supra)[31]

It is also true, that none of the owners of tracts of land *gave their consent to the taking of any mineral estate.* (See again, Art. 8, last paragraph cited supra).

4. The Act of June 3, 1926

The Northern Cheyenne Allotment Act of June 3, 1926 (44 Stat 690) predicated upon, and having its

[29]Treaty of 1868, Art. 8, et seq.

[30]See page four of his brief submitted December 12, 1975.

[31]44 Stat 690.

legal efficacy dependent upon, and derived from, the Treaty of 1868 (cited supra) was in abrogation of said treaty. The provision[32] granting the minerals beneath allotted lands to the tribe was in abrogation of the Treaty of 1868.[33] The allottees did not give their consent to this conveyance by the Congress as required by the Treaty.

Assuming, however, that 44 Stat 690 is valid, an examination of its terms demonstrate the expressed intent of the Congress. Section 3 of the act reads as follows:

> "Sec. 3. That the timber, coal, or other minerals, including oil, gas and other natural deposits, on said reservation are hereby reserved for the benefit of the tribe and may be leased with the consent of the Indian council under such rules and regulations as the Secretary of the Interior may prescribe: Provided, *that at the expiration of fifty years from the date of the approval of this Act the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall become the property of the respective allottees or their heirs.* Provided further, that the unallotted lands of said tribe of Indians shall be held in common, *subject to the control and management thereof as Congress may deem expedient* for the benefit of said Indians."
>
> (Emphasis Supplied)

This gave the allottees a vested remainder interest in the mineral estate following the tribe's estate per term of fifty years.

Respondents confidently contend that reasonable, prudent, english speaking persons everywhere would

[32]44 Stat 690, Section 3.

[33]Treaty of 1868; Art. 8, last paragraph, cited supra (See appendix A-1 to A-7).

agree, just as the circuit Court mandated, that the language in this critical section of the Act was "*. . . simple and plain and its meaning clear to common understanding*". (emphasis supplied; No. 73-1545 et al, page 6; 505 F2d 268; 59 F2d 654, 655.)

The Northern Cheyenne Allotment Statute, (44 Stat 690) is similar to a Crow Allotment Statute of June 4, 1920 (41 Stat 751) which was amended in 1959. (73 Stat 565) *Both* of these statutes reserve minerals to the tribes for a period of fifty (50) years, and *both* provide that at the end of the fifty (50) year period, the minerals will become the property of the allottee, etc.

In the Crow statute, however, Congress *qualified* the future interest created in the allottee by this phrase: "*. . . unless otherwise ordered by Congress*". (Emphasis supplied. cited supra).

A similar phrase "*. . . unless otherwise provided for by Act of Congress . . .*" (emphasis supplied) also appears in Paragraph 7 of Section II of the Osage allotment Act of June 28, 1906. (34 Stat 539)[34]

Congress deliberately omitted this *qualifying* phrase from the Northern Cheyenne Act clearly showing an expressed intention to pass a vested interest in the allottees of these minerals (44 Stat 690, Section 3, cited supra). *This is the crucial salient point.* The allottees' rights to equitable title vested upon com-

[34]Among the allotment acts using the *"unless otherwise provided for by Act of Congress"* clause in addition to the Crow and Osage Acts cited supra., is the Standing Rock and Cheyenne River Reservations; (35 Stat 460) of May 29, 1908; The Blackfeet Indian Reservation (41 Stat 17) of June 30, 1919, and the Fort Belknap Indian Reservation (41 Stat 1355) of March 3, 1921.

NOTE: that all these statutes were passed prior to the Northern Cheyennes' allotment Act here at issue.

pletion of their allotment applications[35] and the minerals pass with the equitable title.[36]

The *Wheeler-Howard Act*, Act of June 18, 1934, 48 Stat 984, terminated allotment of tribal land and only allotment applications perfected as of that date were issued. (See *Allotment Selections on The Fort Belknap Indian Reservation*, 55 I.D. 295 (1935). All the allotments were completed by 1934 on the Northern Cheyenne Reservation, but the granting of patents is merely ministerial, and can be enforced by the Court so that argument is academic anyway.[37] In the *Arenas* case, the Indian was held to have an equitable title *even before the approval of the allotment selection*, which was therefore an inheritable interest.[38]

Any other interpretation of the Cheyenne Act would do deliberate violence to the express wording of that Act.

[35]*Arenas v. United States*, 322 U.S. 419 (1944); *Wyoming v. United States*, 255 U.S. 489 (1921); *Payne v. New Mexico*, 255 U.S. 367 (1921); *Right of Indians to Allotments in San Juan County, Utah*, 57 I.D. 547 (1942); *Allotment Selections on the Fort Belknap Indian Reservation*, 55 I.D. 295 (1935); *Raymond Bear Hill*, 52 I.D. 688 (1929); *Benson Mine & Smelting Co. v. Alta Min. & Smelting Co.*, 145 U.S. 428 (1892).

[36]*Mott v. United States*, 283 U.S. 747 (1931); *Wyoming v. United States*, 255 U.S. 489 (1921); Particularly, please see *Raymond Bear Hill*, 52 I.D. 688 (1929) which held an amendment to an allotment act reserving the minerals to the tribe *did not affect allotments applied for prior to passage of the amendment.*

[37]*United States v. Arenas*, 158 F2d 730.

[38]Cited Supra.

5. Is the Statute of June 3, 1926, (44 Stat 690) Ambiguous, or of an Obscure or Doubtful Meaning?

Petitioner in his brief, continually contends that the provisions of 44 Stat 690 are *"explicit"*. (See peititoner's own brief, page 13, et seq.).

Respondents could not agree more, but cannot agree with respondents as to the *plain meaning* of the words. Petitioner urges the Court that Congress did not intend to pass a present vested interest to the allottees and contend that the following phrase supports the position:

> "Sec. 3. . . . Provided further, that the unallotted lands of said tribe shall be held in common, *subject to the control and management thereof as Congress may deem expedient* for the benefit of said Indians."
>
> (Emphasis Supplied)

Here, Congress spells it out clearly referring to *"unallotted lands"* held in common. If Congress could vest the minerals beneath the allotments at all by the 1926 Act to the Tribe, it did so for a mere term of fifty (50) years. It did not qualify the interest by any *reserving clause or phrase.*

This was not a mere oversight of the Congress, and I know of no words they could have used that would make it any clearer. The Ninth Circuit agreed and mandated that the words of 44 Stat 690 were *"simple and plain, and its meaning clear to common understanding"* (emphasis supplied). No. 1545 et al, Opinion of October 17, 1975, 505 F2d, 268, Quoting 59 F2d, at 655, the Circuit Court further declared:

> "In the plain words of the statute, the minerals were simply reserved, or set aside, for the benefit

> of the tribe for a fixed term of fifty years thereafter to become the property of the allottees, *with no conditions attached to their receipt of these minerals."*
>
> (Emphasis Supplied)
> (Cited Supra)

6. Assuming the Statute to be Ambiguous, should the Ambiguity be Resolved in Favor of the Respondent Class of Allottees, Heirs and Devisees?

Where there is ambiguity in the Statute in question, Judicial notice of, and resort to, the legislative journals to determine the intent of the legislature is permitted. *But it must be ambiguous.* (Please see *Jones on Evidence*, Sixth Edition, Section 2:22; and *Wiseman v. Madison Cadillac Co.* 191 Ark. 1021, 88 S.W.2d, 103 A.L.R. 1208. Similarly, notice will be taken of the fact that a certain bill was intended to *effectuate a particular change of public policy and that it failed of passage in the legislature.* (See *Jones On Evidence*, Sixth Edition, Section 2:22, et al; and, *Crook v. Commonwealth*, 147 Va. 593, 136 S.E. 565, 50 A.L.R. 1043; and *the petitioner's proposed bill that was not enacted into legislation.*

If there be ambiguity, then it is the respondents contention that that ambiguity must be resolved against the United States Government who drafted said legislation, and against its extended arm of corporate creation, the Tribal Corporation, and in favor of the weak and defenseless individual Cheyennes, collectively comprising the entire class of allottees, heirs and devisees. (Please see Federal Incorporation Act of June 18, 1934; (48

Stat 984) and respondents' brief submitted May 21, 1973, page 4, and the case of *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

Petitioners' Exhibits, themselves, serve to confirm the respondents' position, that the omission of the qualifying similar phrases found in other statutes that preceeded the Northern Cheyenne Act, such as "*. . . unless otherwise provided for by act of Congress* . . . (emphasis supplied)", was not a mere oversight, but resulted from *debate* and *deliberation*, and was the *intended, deliberate* and *premeditated act* of the United States Congress. (Please see petitioner's own Exhibits A-2 through A-10 and B-3 through B-9, submitted in support of the petition for rehearing in the Circuit Court and, *Adams et al v. Osage Tribe of Indians*, 50 F2d 918 (D.C. Oklahoma 1931); 59 F2d 653 (10th Cir. 1932), and *Taylor v. Tayrien*, 51 F2d 884 (Cca 10th 1931) both interpreting the same Osage allotment Act, and *British-American Oil Producing Company v. Board of Equalization*, et al, 299 U.S. 159, 81 L.Ed. 95, 98 (1937), and respondents' brief of May 21, 1973, pages 1 through 11.)

Petitioners arguments that the *Adams* case should not have application here because petitioners and respondent are on an equal footing is inaccurate and erroneous at best. The illiterate individual Cheyenne Indian is the one most in need of the protection of this Court, and not the fictitious artificial legal corporate

entity which is capable of perpetual existence.[39] (See corporate Charter of the Cheyenne Tribe of November 7, 1936).

In short, the individual, like this Court, possess neither the "purse" nor the "sword", while the Tribal Corporation controls large sums of money, has perpetual existence, maintains a police force, and *a retained corporate attorney*, and possess and performs many of the attributes of sovereignty. (See Corporate Charter and By-Laws, cited supra.)

Therefore, the *Adams* case (cited supra) applies here just as the 9th Circuit Court perceived:

> *"Treaties and legislative Acts relative to Indians should be construed as illiterate people would understand them."*
>
> (Emphasis Supplied)

It is then a fortiori, that any ambiguity should be resolved in favor of the allottee beneficiaries, and not the Tribal Corporation.

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[39] *Dartmouth College v. Woodward*, 4 Wheat. 518, 636, 657, 4 L.Ed. 629; *U.S. v. Trinidad Coal Co.*, 137 U.S. 160, 11 S.Ct. 57, 34 L.Ed. 640; *Andrews Bros. Co. v. Youngstown Coke Co.*, 86 F. 585, 30 C.C.A. 293; *Porter v. Railroad Co.*, 76 Ill. 573; *Nebraska Wheat Growers' Assn v. Smith*, 115 Neb. 177, 212 N.W. 39, 44; *State v. Thistle Down Jockey Club*, 114 Ohio St. 582, 151 N.E. 709, 711; *Congdon v. Congdon*, 160 Minn 343, 200 N.W. 76, 87; *Forest City Mfg. Co. v. International Ladies Garment Workers Union Local No. 104*, 233 Mo. App 935, 111 S.W.2d 934; *In Re Crown Heights Hospital*, 183 Misc. 563, 49 N.Y.S.2d 658, 660; *Froelich and Kuttner, of Manila, P.I. v. Sutherland*, 57 App. D.C. 294, 22 F2d 870, 872, *Black's Law Dictionary*, Revised Fourth pp 409-412.

7. What is the Significance of Indian Lobbying?

An examination of the Indian petition on its face shows that 493 Northern Cheyenne Indians wanted allotments (See petitioner's Exhibits A-2, A-3, and A-4, filed in the Circuit Court for rehearing), although even as to that fact the *Indians were divided.* (See petitioner's Exhibit A-5, paragraph 2, second sentence.)

Of the approximately 1,408 enrolled Northern Cheyennes residing on the reservation at the time of the petition was allegedly drafted and executed (the petition itself is *undated*, see petitioner's Exhibit A-11, Circuit Court), only 493 subscribed by signing or making their marks (See, also, petitioner's Exhibits A-8 through A-49).

This number represents a little over one-third of the total number of enrollees, not even a bare majority. Further examination of the names themselves reveal that about 171 of the signatures or marks are women and in many instances, the same hand penned different signatures. Some of the remaining signatures were undoubtedly children. It is evident that the requirements of the 1868 Treaty (cited supra), requiring the consent of at least a majority of all adult male Indians *"occupying"* or *"interested"* in the same has not been met, and the *"consent"* of each allottee was certainly not obtained, to divest him of his interest in his allotment as required by the Treaty (cited supra).

However, taking petitioner's Exhibits at face value in their most favorable interpretation, they simply show a special interest group of Northern Cheyenne Indians lobbied Congress for a bill alloting lands reserving minerals to the natural band or tribe of Northern

Cheyenne Indians, who collectively substantially compose respondents' class.[40]

This group of lobbyists were unsuccessful in its efforts and the bill was not passed in the form they apparently desired. (See petitioner's Exhibits B-7, B-8 and B-9 in 9th Circuit Court) although even that bill also interestingly gave the minerals to the allottees after fifty (50) years; (See paragraph one of Section 2, petitioner's Exhibits, 9th Circuit Court, B-8 and B-9).

For a further example, this same group apparently wanted *320 acres* per allotment, (See petitioner's Exhibits A-11, 4th line) which was curiously the same number named in *the Treaty of 1868*, Section 3, (cited supra), also, the proposed bill petitioners Exhibit B-8 (4th line) only 80 acres was drafted.[41]

Congress saw fit, however, to grant only *160 acres* to each allottee in the bills final form. (Act of 1926; 44 Stat 690).

Petitioners propose then, that this Court rewrite the 1926 Allotment Act, not only as to the mineral rights, but also to reduce or enlarge the acreage of the allotments; 80 acres, 160 acres, 320 acres, or perhaps 50 acres, or 1000 acres!!!

RESPONDENTS THINK NOT!

However, it is the respondents' position that the allottees interest in his allotments vested him 320 acres under the Treaty of 1868 (Sec. 3, cited supra) and this included the mineral estate.

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[40]Tribe Incorporated after Act of June 18, 1934 (48 Stat 934).

[41]Also, 80 being the number of acres mentioned in the Treaty of 1868, Sec. 3, for persons " . . over 18 years of age not being head of a family, . . . " (cited supra).

These Exhibits show only evidence of Indian Lobbying for the most part, and therefore, have no greater significance. It cannot be said to reflect a change of policy of Government which was at the time, the allotment system until 1934. (Act. cited supra).

8. Definitions

It may be helpful to review, at this juncture, basic definitions of the words "vested", "property" and "rights".

The Oxford English Dictionary, Vol. XII, reprint 1961, page 160:

> "Vested . . . established, secured, or settled in the hands of, or *definitely assigned to, a certain possessor.*"
>
> (Emphasis Supplied)

again:

> "1766 Blackstone Comm. II 168, *Vested remainders . . . are where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent.*"
>
> (Emphasis Supplied)

In Black's Law Dictionary, Revised Fourth Edition (1968) Page 1734:

> "*Vested.* Fixed; accrued; settled; absolute. Orthwein v. Germania Life Ins. Co. of City of New York, 261 Mo. 650, 170 S.W. 885, 888. Having the character or giving the rights of absolute ownership; *not contingent; not subject to be defeated by a condition precedent.* Scott v. West 63, Wis. 529, 24 N.W. 161; McGillis v. McGillis, 11 App. Div 359, 42 NYS 924; Smith v. Proskey, 39 Misc. 385, 79 NYS 851.
>
> (Emphasis Supplied)

again: (cited supra)

> "*Vested estate* . . . estate by which present interest is invariably fixed to remain to determinate person on determination of preceding freehold estate. Story v. First Nat. Bank & Trust Co. in Orlando, 115 Fla. 436, 156 So 101. An estate, when the person *or the class which takes the remainder is in existence or is capable of being ascertained when the prior estate vests.* Commissioner of Internal Revenue v. Kellog, C.C.A. 3, 119 F.2d 54, 57; or when there is an immediate right of present enjoyment or a present right of future enjoyment. In re Kelly's Estate, 167 Misc. 751, 4 N.Y.S.2d 675, 678.
>
> (Emphasis Supplied)

Black's (cited supra) page 1735:

> "*Vested Interest . . . A future interest not dependent on an uncertain period or event, or a fixed present right of future enjoyment.* In re Whiting, D.C.N.C., 3 F.2d 440, 441; McMannis v. Peerless Casualty Co., 114 Me. 98, 95A. 510. *When a person has a right to immediate possession on determination of preceding or particular estate.* In re Clark's Estate, Orph, 13 N.J. Misc. 393, 178A. 574, 575. One in which there is a present fixed right, either of present enjoyment or of future enjoyment. Painter v. Herschberger, 340 Mo. 347, 100 S.W.2d 532, 535.
>
> (Emphasis Supplied)

"Property" in the Oxford English Dictionary Vol. VIII reprint, 1961, page 1471, is defined:

> "a *That which one owns;* a thing or things belonging to or owned by some person or persons, a possession (usually material) or possessions collectively; (one's) wealth of goods."
>
> "b A piece of land owned; *a landed estate.*
>
> "c Something belonging to a thing; an appurtenance; an adjunct."
>
> (Emphasis Supplied)

Black's Law Dictionary Revised, Fourth Edition, page 1382, defines "property":

> "*Property*. That which is peculiar or proper to any person; . . . *in the strict legal sense, an aggregate of rights which are guaranteed and protected by the government.* Fulton Light, Heat & Power Co. v. State, 65 Misc. Rep. 263, 121 N.Y.S. 536. *The term is said to extend to every species of valuable right and interest.* McAlister v. Pritchard, 230 S.W. 66, 67, 287 Mo. 494."
>
> (Emphasis Supplied)

Again, Black's (cited supra) at page 1383:

> "Private property. *As protected from being taken for public uses*, is such property as belongs absolutely to an individual . . ."
>
> (Emphasis Supplied)

Again, Black's (cited supra) at Page 1383:

> "Real Property. Land, and generally . . . *Also rights issuing out of, annexed to, and exercisable within or about land*; a general term for lands, tenements, and hereditaments; property which on the death of their owner intestate, passes to his heir. Ralston Steel Car Co. v. Ralston, 112 Ohio St. 306, 147 NE. 513, 516, 39 ALR 334."
>
> (Emphasis Supplied)

The term "right" has been defined extensively both in the Oxford English Dictionary, reprint, 1961 Vol. VIII, page 669, and in Black's Law Dictionary, Fourth Edition (1968), pages 1486 and 1487, and depends upon whether it is used as a noun or adjective, abstract or concrete, perfect or imperfect, primary or secondary, absolute or qualified, etc.

We are considering the term "right" here as it pertains to a right in rem:

> "A right in rem is one which imposes an obligation on persons generally; i.e. either on all the world or

> on all the world except certain determinate persons. Thus, if *I am entitled to exclude all persons from a given piece of land, I have a right in rem in respect of that land; and if there are one or more persons, A., B., and C., whom I am not entitled to exclude from it, my right is still a right in rem.*"
>
> (Emphasis Supplied)

And, this right as it applies to Constitutional Law is a *civil right* and as such belong to *every citizen* of the State or Country. (Emphasis Supplied)

See Black's (cited supra) page 1487:

> ". . . They included the rights of *property*, marriage, *protection by the laws*, freedom of contract, trial by jury, etc. Winnett v. Adams, 71 Neb. 817, 99 N.W. 681; or, as otherwise defined, civil rights are rights appertaining to a person *in virtue of his citizenship in a state or community*. Rights capable of being enforced or redressed in a civil action. Also a term applied to *certain rights secured to citizens by the United States* . . ."
>
> (Emphasis Supplied)

It is also well established, and giving to the term a juristic content:

> "A 'right' is well defined as 'a capacity residing in one man of controlling, with *the assent and assistance of the state the actions of others*' . . . Hall. Jur. 69."
>
> (Emphasis Supplied)

(See Black's, cited supra, page 1486)

It is clear from a review of these terms, that respondent class received a vested property right in their allotments, including the minerals, a right in rem, guaranteed by the Constitution, a present vested right of future enjoyment, upon the expiration of the fifty (50) year period in the tribe by the 1926 Act. (cited

supra). This is true of course, only if they did not already take allotments, including the minerals, under the treaty of 1868 (cited supra).

9. Plenary Powers of Congress not Absolute

Petitioner has cited authorities which he claims demonstrate that the Congress need not expressly reserve the right to reallocate tribal property in order to retain it. Here again, he refers to *tribal property* and fails or refuses to note the distinction in *private property, to-wit: the allotments.*[42] Petitioner's Cases are not on target and are out of point.[43] These cases then all involve lands held in common, unallotted land, tribal land and not vested allotments, where Congress could exercise its plenary power "... *to give to these people full protection in their persons and their property* ..." (emphasis supplied) in *U.S. v. Thomas*, 151 U.S. 577,

[42]See petitioner's brief in support of certiorari, and on the merits of December 12, 1975.

[43]*United States v. Jim*, 409 U.S. 80 (197_) involves distribution of royalties from *tribal lands*, thus correctly applying the *Gritts* rule for the reallocation of tribal property.

Chase Jr. v. United States, 256 U.S.1, (1921) this case pertained to a statute terminating allotment prior to Chase *selecting* it, and therefore, no private rights vested. Thus land remained *tribal land*, and could be reallocated.

United States v. Rowell, 243 U.S. 464 (1917) involved an allotment application of a *non*-Indian which was revoked prior to issuance of patent. Thus, again *tribal lands* were involved.

Sizemore v. Brady, 235 U.S. 441 (1914) this case involved inheritance rights in an allotment *when the allottee died prior to actually receiving the allotment*. Again, *tribal land.*

Nadeau v. Union Pacific Railroad, 253 U.S. 442 (1920) involved *unallotted*, or *tribal land* given to railroad.

585, (1894). Also, in the case of *Morrison v. Work* 266 U.S. 481 485 (1925) the Court declared:

> "It is admitted that, as regards *tribal property* subject to the control of the U.S. ... Congress may make such changes in the management and disposition as *it deems necessary to promote* their welfare."
>
> (Emphasis Supplied)

But, in *U.S. Alcea Band of Tillamooks*, et al, No. 26, 329 U.S. 40 (1946) the Court mandated with regard to the power of Congress to regulate Indian Affairs:

> "... although plenary, *it is not absolute*..."
>
> (Emphasis Supplied)

Even so, this highest court had so said as early as 1899.[44] Other cases cited by petitioner involve *personal status* of the parties and not private property rights as such. (Privileges such as citizenship, treaty rights, peculiar to Indian persons, wardship, etc.[45] Therefore, these cases again are not in point. Besides *mere enrollment* for the purpose of Indian allotments of land concern property rights and cannot be taken away without notice and an opportunity to be heard. (See *Duncan Townsite Co. v. Lane*, 245 U.S. 308, 62 L.Ed. 309, 38 S.Ct. 99; and, *U.S. ex rel Turner v. Fisher*, 222 U.S. 204, Ed. 165, 32 S.Ct. 37.)

[44]Stephens v. Cherokee Nation, 174 U.S. 455, 478, 19 S.Ct. 722, 734, 43 L.Ed. 1041.

[45]Lowe v. Fisher, 223 U.S. 95 (1912); Wallace v. Adams, 204 U.S. 415 (1907); Stephens v. Cherokee Nation, 174 U.S. 455 (1899).

Other cases cited by petitioner deal with the Indians personal status as a ward and have again no application to the case at bar.[46]

The case of *Sweet v. Schock*, 245 U.S. 192 (1917) which petitioner also contends support his position, pertains to whether a tax redemption runs with the land and reversion when passing beyond *Indian* ownership. The tax exemption was held to cease when passing to a *non*-Indian.

The United States Supreme Court said, per Mr. Justice Van Devanter in 1937, in the case of Chippewa Indians v. U.S., 301 U.S. 358:

> ". . . Our decisions, while recognizing that the government has power to *control and manage the property* and affairs of its Indian Wards *in good faith for their welfare*, show that *this power is subject to constitutional limitations* and does not enable the government to *give lands of one tribe or band to another, or to deal with them as its own . . .*"
>
> (Emphasis Supplied)
> pp 375-376

Again in *U.S. v. Alcea Band of Tillamooks*, (cited supra) confirming former case holdings, the Court said:

[46]United States v. Jackson, 280 U.S. 183 (1930) involved question of whether Congress can extend the period of the restraint on alienation of trust allotments; Brader v. James, 246 U.S. 88 (1918); Williams v. Johnson, 239 U.S. 414 (1915); United States v. Bartlett, 235 U.S. 72 (1914); Hickman v. United States, 224 U.S. 413 (1912); Goat v. United States, 224 U.S. 458 (1912); and, Tiger v. Western Investment Co., 221 U.S. 286 (1911). These cases all have little, if anything to do with property rights. Goat, Hickman, Brader and Jackson cases really just reaffirmed Tiger which is the leading case that held that the restraint on alienation was an attribute of the Indian's Wardship. Personal status, again not pertaining to property rights.

> *"It does not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes without rendering, or assuming an obligation to render just compensation for them."*
>
> (Emphasis Supplied)

Here we have conclusively established that even as to *tribal lands* the Congresses' power is not absolute, to say nothing of private allotments vested pursuant to Treaty or Congressional Act. (Cited Supra).

Petitioner would have this High Court condone, confirm and enforce the taking of private property (the minerals) from individual Indians and give them forever to the Tribal Corporation.

THIS IS NAKED CONFISCATION.

10. Violation of Fifth Amendment AND CHOATE V. TRAPP[47]

The 1968 Act[48] is without a doubt retroactive legislation seeking to divest the allottees, heirs and devisees of their minerals beneath the allotted lands and to vest these mineral rights in perpetuity in the Tribal Corporation.[49]

The 9th Circuit Court mandate rests squarely upon this High Court's mandate in the celebrated case of Choate v. Trapp, 224 U.S. 665 of 1912. This precedent has been followed in at least twenty seven Federal

[47]224 U.S. 655, 675 (1912) The Legal Services motions under Rule 5(1) are in error. This writer first cited the *Choate v. Trapp* case in the District Court brief *first submitted* August 14, 1972.

[48]82 Stat 424, 425.

[49]Ninth Circuit Court Mandate of October 17, 1974; No.-73-1545, et al.

Court decisions. Nine of these are U.S. Supreme Court decisions.[50] Amendment V of the U.S. Constitution declares:

> *"No person shall be . . . deprived* of life, liberty or *property*, without due process of law: *nor shall private property be taken for public use, without just compensation.*"
>
> (Emphasis Supplied)

Obviously, this case at "first blush" is a governmental taking of private personal property to give to a Federal Corporation and can hardly be considered a "public use".[51]

Whenever the power of eminent domain is conferred or delegated to some corporation or municipality, and nothing is expressly stated about the estate to be taken, the power is usually strictly construed, so that only

[50] *English v. Richardson*, 224 U.S. 680 (1912); *Gleason v. Wood*, 224 U.S. 679 (1912); *Sizemore v. Brady*, 235 U.S. 441, 449 (1914); *Williams v. Johnson*, 239 U.S. 414, 419 (1915); *Ward v. Love County*, 253 U.S. 17, 20, 21 (1919); *Carpenter v. Shaw*, 280 U.S. 363, 365, 366 (1929); *Mott v. United States*, 283 U.S. 747, 752 (1931); *County of Mahnomen v. U.S.* 319 U.S. 474, 476 (1943); *Oklahoma Tax Comm. v. United States*, 319 U.S. 598, 603 (1943). These cases expressly agree with *Choate's* Constitutional protection of individual Indian's property rights and should not now be overruled.

[51] Whether the Courts have power to review a determination of the lawmakers that a particular use is a "*public use*" was left hanging in *U.S. ex rel T.V.A. v. Welch*, 327 U.S. 546 (1946). However, Justice Frankfurter interpreted the controlling opinion and said: " . . . *whether a taking is for a public purpose is not a question beyond judicial competence.*" (emphasis supplied). Other decisions supporting this dicta are *U.S. v. Gettysburg Electric Ry.*, 160 U.S. 668, 680 (1896); *Rindge Co. v. Los Angeles*, 262 U.S. 700, 709 (1923); *Old Dominion Co. v. U.S.*, 269 U.S. 55, 66 (1925); *Cincinnati v. Vester*, 281 U.S. 439, 446 (1930).

such an estate may be taken as is necessary for the public purposes intended, but this is entirely a matter of construction and not of constitutional power (*Fairchild v. St. Paul*, 46 Minn. 540).

An invasion of the air above the ground, as well as pollution of it by smoke has been held a wrongful taking of property, as has pollution of surface and subsurface waters by acid or byproducts.[52]

It is the individual respondent class's opinion that the 1968 Amendment[53] that places upon the Tribal Corporation the onus of bringing this class action to determine the constitutionality of the same Act that endeavors to take title to the minerals from the respondent class and vest it forever in the Tribal Corporation is an open naked and notorious act of confiscation by the U.S. Congress.[54] No provision is even made for attorney fees or costs for thrusting this unwanted litigation on the individual allottees, who are for the most part, indigents except for their allotted lands. An injunction should have property issued in the Lower Court upon a determination of the fair value of the property already taken.[55]

[52] *U.S. v. Causby*, 328 U.S. 256 (Other cases cited herein).

[53] 82 Stat. 424, 425.

[54] P.L. 90-424, 82 Stat 424, which amended Section 3 of the 1926 Act reads as follows: "(a) *The coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved in perpetuity for the benefit of the tribe* and may be leased with the consent of the Indian Council for mining purposes . . . under such rules, regulations, and conditions as the Secretary of the Interior may prescribe.". (Emphasis Supplied).

[55] See litigation history in this brief and the prospecting permit and lease moneys paid to the Tribal Corporation by Order of September 29, 1972. (See case of *Galway v. Elevated Railway*, 128 N.Y. 132.).

Approximately sixty two (62%) per cent of the Northern Cheyenne Indian Reservation is already owned by the Tribal Corporation, and may be leased, or mined regardless of the outcome of this litigation. Only the remaining thirty seven (37%) per cent owned by allottees, heirs or devisees is here in issue.

Such retroactive legislation had to have been motivated by Congressional desire to vest all minerals in the Tribal Corporation, so that coal and oil companies might escape negotiations with fractional Indian interests.[56]

Such retroactive legislation, born of political and economical expediency, has been repeatedly struck down as violative of the due process clause. In the case of *Nobel v. Union River Logging Railroad*, 157 U.S. 165 (1894), a revocation by the Secretary of the Interior of previous approval of plats and documents showing that a railroad was entitled to land under a grant was held void as an attempt to deprive the company of its property.

In the case of *Danzer Co. v. Gulff R.R.*, 268 U.S. 633 (1925), the exception of the period of Federal control from the time limit set by law upon claims against carriers for damages caused by misrouting of goods, was read *prospectively only* because the limitation was an integral part of the liability, *not merely a matter of remedy*, and would violate the Fifth Amendment when retroactive.

[56]It should be remembered that the Federal Government is the Fiduciary Trustee to both the Tribe and the Indian, and this 1968 Act and previous legislation (48 Stat 934) of 1934, permitted the Fiduciary to do by the back door, that which it could not do by the front.

Rights against the United States *arising out of contract* have been repeatedly held protected by the Fifth Amendment; hence a statute *abrogating contracts* of war risk insurance was *also held unconstitutional* as applied to outstanding policies.[57]

The 1968 Amendment (cited supra) is clearly retroactive legislation abrogating the treaty of 1868 (15 Stat 655)[58] and the legislative Act of 1926 (44 Stat 690).

Congress has no authority over allotments and the minerals they contain after patents have been issued without qualifying or reserving clause such as are found in the other allotment Acts (cited supra) and which said clause is absent in the Northern Cheyenne Allotment Act (cited supra).[59]

In fact and in law, the allottee has the right to lease his minerals under 25 U.S.C. 396.

Also, the argument of petitioner that the patent issued under the 1926 Act reserved the minerals to the tribe, is of no significance whatsoever, because the Act itself limited the estate of fifty years. This Court said in *Choate v. Trapp* (cited supra):

> "Those who signed the patent could *not convey more rights* than were granted by that part of the *Curtis Act, nor could they by omission deprive* the patentee of any exemption to which he was thereby entitled."
>
> (Emphasis Supplied)

[57] *Lynch v. U.S.*, 292 U.S. 571, 579 (1934); *Perry v. U.S.*, 294 U.S. 330 (1935); *DeLa Rama S.S. Co. v. U.S.*, 344 U.S. 386 (1953); *Cf. F.H.A. v. Darlington, Inc.*, 358 U.S. 84 (1958).

[58]The Congress has *ratified the Treaty* of 1868 by every *Act of appropriation of moneys* for administering and implementing said Treaty beginning in 1869 and continuing until 1950. See Appendix B-1 and the case of *Antoine v. Washington*, 420 U.S. 194, decided by this High Court on February 1975.

[59]*Sizemore v. Brady*, (cited supra).

This Court leaves no reasonable doubt as to the application of *Choate v. Trapp* in the following principled terms:

> "Under the provisions of the Fifth Amendment there was no more power to deprive him of the exemption *than any other right in the property. No statute would have been valid which reduced his fee to a life estate, or attempted to take from him 10 acres, or 50 acres, or the timber growing on the land.*"
>
> (Emphasis Supplied)

In Morrow, County Auditor, et al v. U.S. (1917) 243 Fed. Reporter 854, the Court further mandated:

> "The government may in its dealings with Indians *create property rights which, once vested, even it cannot alter, and such property rights* may result from *agreements either in the form of a treaty or of a statute*; the important considerations being that there should be the *essentials of a binding agreement between the government and the Indian* and the resultant *vesting of a property right in the Indian.*"
>
> (Emphasis Supplied)

The Court cited as precedents, a number of cases in support of its position.[60]

Therefore, the Ninth Circuit Court of Appeals correctly applied *Choate v. Trapp* as controlling and *Adams, et al v. Osage*, (Cited supra) pertaining to the

[60] *Williams v. Johnson*, 239 U.S. 414, 420, 36 S.Ct. 150, 60 L.Ed. 358; *Sizemore v. Brady*, 235 U.S. 441, 449, 35 S.Ct. 135, 59 L.Ed., 308; *Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941; *English v. Richardson*, 224 U.S. 680, 32 S.Ct. 571, 56 L.Ed. 949; *Johnes v. Mechan*, 175 U.S. 1, 20 S.Ct. 2, 44 L.Ed.49; (Fee simple title, including minerals) and *Chase v. U.S.* 222 Fed. 593, 596, 138 C.C.A. 117.

interpretation and clear and common meaning of the statute.

Absent the qualifying phrase the allottees took a present vested interest in the minerals for future enjoyment.[61]

SUMMARY AND CONCLUSION

1. There can exist no reasonable doubt that the rights obtained by the Tribe in the unallotted land and the rights obtained by the individual Indians in the allotments by the Treaty of 1868 (15 Stat 655) conveyed both the surface and subsurface rights.

Failure to reserve the minerals to the United States, or anyone else, it conveyed them and the Treaty must be construed against the United States and in the most favorable light, to the illiterate Indian Wards. It must be construed liberally for the Indians and the words taken in their plain meaning and common understanding.[62]

2. The Executive Orders of both Presidents Arthur and McKinley further circumscribing and enlarging the reservation was a further recognition of the 1868 Treaty and constitute subsequent executive ratifications of the rights of the Indians.

3. Appropriations of money for the administration and implementation of the 1868 Treaty,[63] beginning

[61] See *Crow, Osage, Standing Rock, Blackfeet,* and *Fort Belknap* attotment acts, cited supra herein, and cases of *Taylor v. Tayrien*, 51 F.2d 884, and *British-American Oil Producing Co. v. Board of Equalization of the State of Montana*, et al 299 U.S. 158, and *Adams*, cited supra, interpreting.

[62] Adams et al v. Osage et al, 50 F.2d 918.

[63] See Appendix B-1 Analysis of GAO Report, Pet. Ex. 113.

with 16 Stat 15, in 1869 and ending with 64 Stat 1052, in 1950, were all subsequent Congressional recognition and repeated ratifications of the Treaty.[64] after all hostilities ceased.

4. The Northern Cheyenne were granted citizenship by the Act of June 2, 1924 (43 Stat 253) removing any pre-existing doubt as to whether Indians were entitled to Constitutional protections.

5. The allotment system existing from 1868 all the way through to 1934 envisioned the final passing of a fee simple title to the allotments, unless a reserving or qualifying clause was inserted, and this included the minerals.[65] This was the stated policy of the government during that time.[66]

6. The allotment Act of June 3, 1926 (44 Stat 690) confirmed and was a further recognition by the United States of the vested property rights in the Cheyenne, including the minerals. However, the Section reserving the minerals to the Tribe for fifty years was in abrogation of the allotments given unqualifyidly to the individual Northern Cheyenne in the 1868 Treaty.

7. In either event, the minerals were reserved to the natural band or tribe and not the Tribal Corporation for a mere term of fifty years, and the 1926 Act contained no other qualifying or reserving clause, as did all other allotment Acts passed prior to the Cheyenne Allotment Act.

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[64]Antoine v. Washington, 420 U.S. 194, 43 L.Ed.2d 129 95 S.Ct. 944, 43 U.S. L.W. 4257, (Feb. 19, 1975).

[65]Allotment Acts cited herein heretofore; and 1 Op Atty General William Wirt cited supra.

[66](Cited supra).

8. The Tribe did not incorporate, if at all, until after the Act of June 18, 1934 (48 Stat 934), because the Treaty provisions for ceding both tribal land and the mineral estate in the alloted lands were not complied with.

9. The intent of the Congress when the 1926 Act was passed was to compel the Indian to follow the Whitemans Agrarian way of life.

10. Issuance of fee patents are ministerial acts merely, and are enforceable in the Courts.

11. There has been a wrongful and shameful taking of the vested property rights in the minerals beneath the allotted lands within the meaning of the Fifth Amendment that requires just compensation.[67]

12. The 1968 Act (82 Stat 424, 425) is retroactive legislation and void ab initio, and unconstitutional and was an act of deliberate naked confiscation.

The main pivotal issue and all collateral and ancillary issues should be resolved in favor of the respondent class of allottees, heirs and devisees.

All prospecting permit and lease moneys should be returned to the respondents and they should be declared the equitable owners of the minerals beneath their allotments, and in 1976, the legal owners of the minerals. Just compensation including attorney fees and court costs should be awarded, along with permanent injunctive relief and further, the Ninth Circuit Court of Appeal decision affirmed.

Common sense requires but one possible decision, for if this case had involved any other citizens other than redmen, the controversy would long ago have ended in their favor.

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[67]*Choate v. Trapp*, cited supra, et seq.

Respondents confidently contend this Court will not reduce the Indian to something less than a full citizen and will not, as petitioner urges, reduce this Court from a fountain head of justice to an arena of political and economical expediancy.

"Jus Est Norma Recti; Et. Quicquid Est Contra Normam Recti Est Injuria."

For the reasons stated, it is respectfully submitted that the judgment of the Ninth Circuit Court of Appeals below, should be affirmed.

Respectfully submitted,

LEWIS E. BRUEGGEMANN
Office and Post Office Address
256-7-8 Hart Albin Building
Billings, Montana 59101
Attorney for Respondent Class

January, 1976

APPENDIX A

TREATY

BETWEEN

THE UNITED STATES OF AMERICA

AND THE

NORTHERN CHEYENNE AND NORTHERN ARAPAHOE TRIBES OF INDIANS.

CONCLUDED MAY 10, 1868.
RATIFICATION ADVISED JULY 25, 1868.
PROCLAIMED AUGUST 25, 1868.

ANDREW JOHNSON.

PRESIDENT OF THE UNITED STATES OF AMERICA.

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

Whereas a treaty was made and concluded at Fort Laramie, in the Territory of Dakota, on the tenth day of May, in the year of our Lord one thousand eight hundred and sixty-eight, by and between Lieutenant General William T. Sherman, Brevet Major General William S. Harney, Brevet Major General Alfred H. Terry, Brevet Major General C. C. Augur, John B. Sanborn, and S. F. Tappan, Commissioners, on the part of the United States, and Wah-Toh-Nah, Bah-T...-Che, and other Chiefs and Headmen of the Northern Cheyenne and Northern Arapahoe tribes of Indians, on the part of said Indians, and duly authorized thereto by them, which Treaty is in the words and figures following, to wit:

Articles of a Treaty made and concluded at Fort Laramie, Dakota Territory, on the tenth day of May, in the year of our Lord one thousand eight hundred and sixty-eight, by and between the undersigned commissioners on the part of the United States, and the under-signed chiefs and headmen of and representing the Northern Cheyenne and Northern Arapahoe Indians, they being duly authorized to act in the premises.

ARTICLE I.

From this day forward peace between the parties to this treaty shall forever continue. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it. If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly

agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States to be tried and punished according to its laws; and in case they willfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating or because of his violating the provisions of this treaty or the laws of the United shall be reimbursed therefor.

ARTICLE II.

The Indians, parties to this treaty, hereby agree to accept for their permanent home some portion of the tract of country set apart and designated as a permanent reservation for the Southern Cheyenne and Arappahoe Indians by a treaty entered into by and between them and the United States, at Medicine Lodge creek, on the — day of October, 1867, or some portion of the country and reservation set apart and designated as a permanent home for the Brulé and other bands of Sioux Indians, by a treaty entered into by and between said Indians and the United States, at Fort Laramie, D. T., on the 29th day of April, 1868. And the Northern Cheyenne and Arappahoe Indians do hereby relinquish, release, and surrender to the United States all right, claim, and interest in and to all territory outside the two reservations above mentioned, except the right to roam and hunt while game shall be found in sufficient quantities to justify the chase. And they do solemnly agree that they will not build any permanent homes outside of said reservations, and that within one year from this date they will attach themselves permanently either to the agency provided for near the mouth of Medicine Lodge creek, or to the agency about to be established on the Missouri river, near Fort Randall, or to the Crow agency near Otter creek, on the Yellowstone river, provided for by treaty of the seventh day of May, 1868, entered into by and between the United States and said Crow Indians, at Fort Laramie, D. T.; and it is hereby expressly understood that one portion of said Indians may attach themselves to one of the aforementioned reservations, and another portion to another of said reservations, as each part or portion of said Indians may elect.

ARTICLE III.

If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservations not exceeding three hundred and twenty acres in extent, which tract, when so selected, certified, and recorded in the "Land Book" as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate containing a description thereof and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Northern Cheyenne and Arappahoe Land Book."

The President may, at any time, order a survey of the reservation; and when so surveyed, Congress shall provide for protecting the rights of settlers in their improvements, and may fix the character of the title held by each.

The United States may pass such laws on the subject of alienation and descent of property as between Indians and on all subjects connected with the government of the Indians on said reservations, and the internal police thereof as may be thought proper.

Article IV.

In order to insure the civilization of the tribe entering into this treaty, the necessity of education is admitted, especially by such of them as are or may be settled on said agricultural reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children, between said ages, who can be induced or compelled to attend school, a house shall be provided, and a teacher, competent to teach the elementary branches of an English education, shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for twenty years.

Article V.

When the head of a family or lodge shall have selected lands, and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year in value one hundred dollars, and for each succeeding year he shall continue to farm for a period of three years more he shall be entitled to receive seeds and implements as aforesaid in value twenty-five dollars per annum.

And it is further stipulated that such persons as commence farming shall receive instructions from the farmer herein provided for, and whenever more than one hundred persons shall enter upon the cultivation of the soil a second blacksmith shall be provided, with such iron, steel, and other material as may be needed.

Article VI.

In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any and all treaties heretofore made with them, the United States agrees to deliver at the agency house, on the reservations herein provided for, on the first day of September of each year, for thirty years, the following articles, to wit:

For each male person over fourteen years of age, a suit of good substantial woolen clothing, consisting of coat, hat, pantaloons, flannel shirt, and a pair of woolen socks.

For each female over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woolen hose, twelve yards of calico, and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woolen hose for each.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimates from year to year can be based.

And, in addition to the clothing herein named, the sum of ten dollars shall be annually appropriated for each Indian roaming, and twenty dollars for each Indian engaged in agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper. And if, at any time within the ten years, it shall appear that the amount of money needed for clothing under this article can be appropriated to better uses for the tribes herein named, Congress may by law change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods, herein named, to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery; and it is expressly stipulated that each Indian over the age of four years, who shall have removed to and settled permanently upon said reservation and complied with the stipulations of this treaty, shall be entitled to receive from the United States, for the period of four years after he shall have settled upon said reservation, one pound of meat and one pound of flour per day, provided the Indians cannot furnish their own subsistence at an earlier date; and it is further stipulated that the United States will furnish and deliver to each lodge of Indians, or family of persons legally incorporated with them, who shall remove to the reservation herein described and commence farming, one good American cow and one well broken pair of American oxen, within sixty days after such lodge or family shall have so settled upon said reservation.

Article VII.

The United States hereby agrees to furnish annually to the Indians who settle upon the reservation a physician, teachers, carpenter, miller, engineer, farmer, and blacksmiths, as herein contemplated, and that such appropriations shall be made from time to time on the estimates of the Secretary of the Interior as will be sufficient to employ such persons.

Article VIII.

No treaty for the cession of any portion of the reservations herein described, which may be held in common, shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his right to any tract of land selected by him, as hereinbefore provided.

ARTICLE IX.

It is agreed that the sum of five hundred dollars annually for three years, from the date when they commenced to cultivate a farm, shall be expended in presents to the ten persons of said tribe who, in the judgment of the agent, may grow the most valuable crops for the respective year.

W. T. SHERMAN,
Lt. Gen'l.
WM. S. HARNEY,
Bvt. Maj. Gen. U. S. A.
ALFRED H. TERRY,
Bvt. M. Gen'l.
C. C. AUGUR,
Bvt. Maj. Gen'l.
JOHN B. SANBORN,
S. F. TAPPAN,
Commissioners.

Attest:
ASHTON S. H. WHITE, *Secretary.*

Wah-tah-nah,	Black Bear.	his x mark.	[SEAL.]
Bah-ta-che,	Medicine Man.	his x mark.	[SEAL.]
Oh-cum-ga-che.	Little Wolf.	his x mark.	[SEAL.]
Ichs-tah-en.	Short Hair.	his x mark.	[SEAL.]
Non-ne-se-be,	Sorrel Horse.	his x mark.	[SEAL.]
Ka-te-u-nan,	The Under Man.	his x mark.	[SEAL.]
Ah-che-e-wah,	The Man in the Sky.	his x mark.	[SEAL.]
We-ah-se-vose,	The Big Wolf.	his x mark.	[SEAL.]
Ches-ne-on-e-ah,	The Beau.	his x mark.	[SEAL.]
Mat-ah-ne-we-tah,	The Man that falls from his horse.	his x mark.	[SEAL.]
Oh-e-na-ku,	White Crow.	his x mark.	[SEAL.]
A-che-kan-koo-eni,	Little Shield.	his x mark.	[SEAL.]
Tah-me-la-pash-me,	or Dull Knife.	his x mark.	[SEAL.]

Attest:
GEORGE B. WILLIS, *Phonographer.*
JOHN D. HOWLAND.
ALEX. GARDNER.
DAVID KNOX.
CHAS. FREEMAN.
JAS. C. O'CONNOR.

And whereas the said Treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the twenty-fifth day of July, one thousand eight hundred and sixty-eight, advise and consent to the ratification of the same by a resolution, in the words and figures following, to wit:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES.
July 25, 1868.

Resolved, (*two-thirds of the senators present concurring,*) That the Senate advise and consent to the ratification of the treaty between the United States and

the Northern Cheyenne and Northern Arapaho[e] Indians, made the tenth day of May, 1868.

Attest:

GEO. C. GORHAM,
Secretary.
By W. J. McDONALD,
Chief Clerk.

Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the twenty-fifth of July, one thousand eight hundred and sixty-eight, accept, ratify, and confirm the said Treaty.

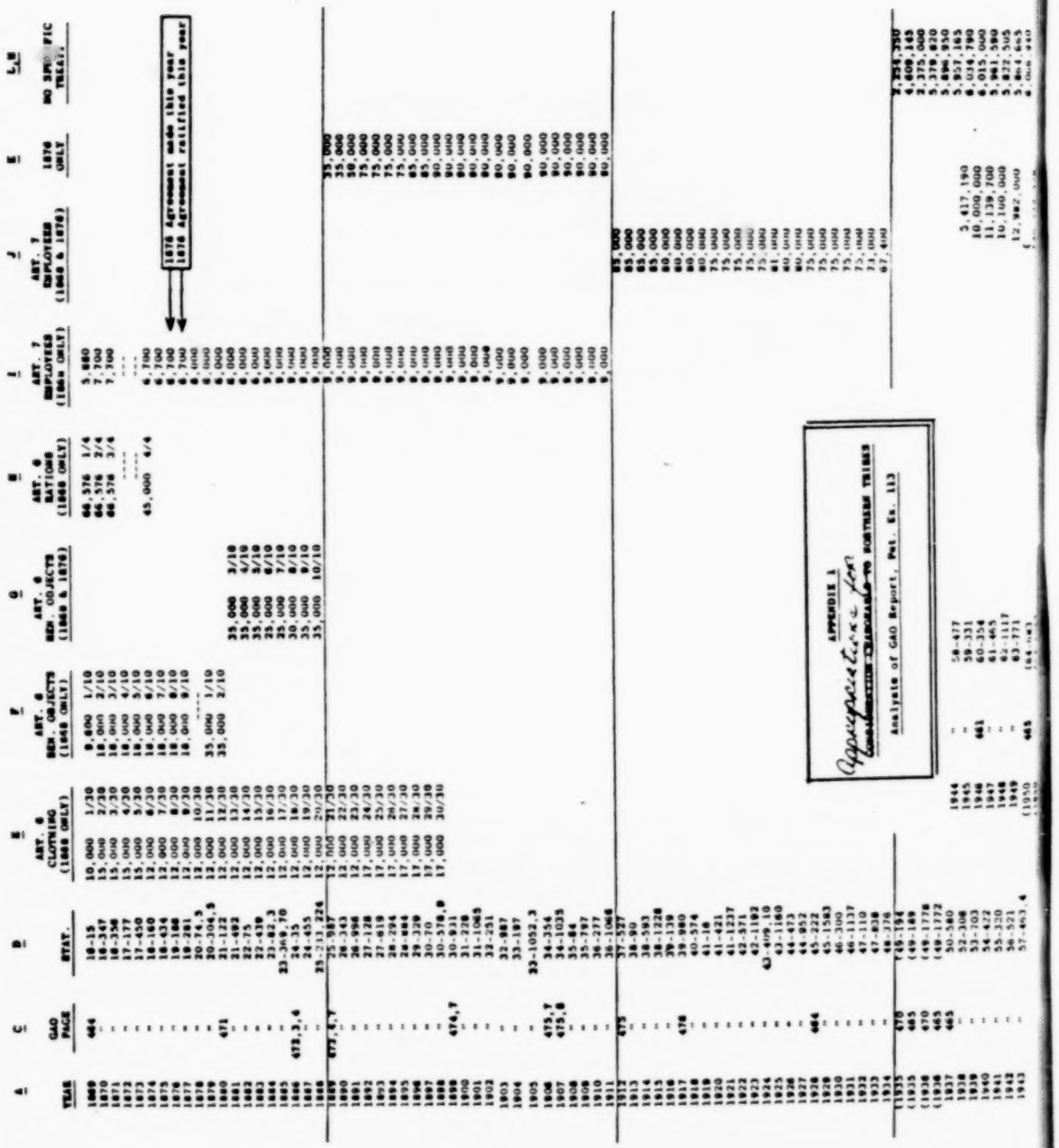
In testimony whereof, I have hereto signed my name and caused the seal of the United States to be affixed.

Done at the city of Washington this twenty-fifth day of August, in the [SEAL.] year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States of America the ninety-third.

ANDREW JOHNSON.

By the President:
WILLIAM H. SEWARD,
Secretary of State.

APPENDIX B



APPENDIX C

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS

CORPORATE CHARTER

OF THE

NORTHERN CHEYENNE TRIBE OF THE TONGUE RIVER RESERVATION MONTANA

RATIFIED NOVEMBER 7, 1936

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1937

CORPORATE CHARTER OF THE NORTHERN CHEYENNE TRIBE OF THE TONGUE RIVER RESERVATION

A FEDERAL CORPORATION CHARTERED UNDER THE ACT OF JUNE 18, 1934

Whereas, the Northern Cheyenne Tribe of the Tongue River Reservation in Montana is a recognized Indian Tribe organized under a constitution and by-laws ratified by the Tribe on November 2, 1935 and approved by the Secretary of the Interior on November 23, 1935 pursuant to section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378); and

Whereas, more than one-third of the adult members of the Tribe have petitioned that a charter of incorporation be granted to such Tribe, subject to ratification by a vote of the adult Indians living on the reservation;

Now, therefore, I, T. A. Walters, Acting Secretary of the Interior, by virtue of the authority conferred upon me by the said Act of June 18, 1934. (48 Stat. 984), do hereby issue and submit this charter of incorporation to the Northern Cheyenne Tribe of the Tongue River Reservation to be effective from and after such time as it may be ratified by a majority vote in an election at which at least thirty per cent of the adult Indians living on the reservation shall vote.

Corporate Existence and Purposes.

1. In order to further the economic development of the Northern Cheyenne Tribe of the Tongue River Reservation in Montana by conferring upon the said Tribe certain corporate rights, powers, privileges and immunities; to secure for the members of the Tribe an assured economic independence; and to provide for the proper exercise by the Tribe of various functions heretofore performed by the Department of the Interior, the aforesaid Tribe is hereby chartered as a body politic and corporate of the United States of America, under the corporate name "The Northern Cheyenne Tribe."

Perpetual Succession.

2. The Northern Cheyenne Tribe shall, as a Federal Corporation, have perpetual succession.

Membership.

3. The Northern Cheyenne Tribe shall be a membership corporation. Its members shall consist of all persons now or hereafter members of the Tribe, as provided by its duly ratified and approved Constitution and By-laws.

Management.

4. The Tribal Council of the Northern Cheyenne Tribe established in accordance with the said Constitution and By-laws of the Tribe, shall exercise all the corporate powers hereinafter enumerated.

313565—37

Corporate Powers.

5. The Tribe, subject to any restrictions contained in the Constitution and laws of the United States, or in the Constitution and By-laws of the said Tribe, shall have the following corporate powers, in addition to all powers already conferred or guaranteed by the Tribal Constitution and By-laws:

(a) To adopt, use, and alter at its pleasure a corporate seal.

(b) To purchase, take by gift, bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, subject to the following limitations:

(1) No sale or mortgage may be made by the Tribe of any land, or interests in land, including water power sites, water rights, oil, gas, and other mineral rights, now or hereafter held by the Tribe within the boundaries of the Tongue River Reservation.

(2) No mortgage may be made by the Tribe of any standing timber on any land now or hereafter held by the Tribe within the boundaries of the Tongue River Reservation.

(3) No leases, permits (which terms shall not include land assignments to members of the Tribe) or timber sale contracts covering any land or interests in land now or hereafter held by the Tribe within the boundaries of the Tongue River Reservation shall be made by the Tribe for a longer term than five years, as provided in section 1 (c), Article IV, of the Constitution of the Tribe, and all such leases, permits or contracts must be approved by the Secretary of the Interior or by his duly authorized representative; but oil and gas leases, water power leases, or any leases requiring substantial improvements of the land may be made for longer periods when authorized by law.

(4) No action shall be taken by or in behalf of the Tribe which in any way operates to destroy or injure the tribal grazing lands, timber, or other natural resources of the Tongue River Reservation. All leases, permits, and timber sale contracts relating to the use of tribal grazing or timber lands shall conform to regulations of the Secretary of the Interior authorized by section 6 of the Act of June 18, 1934, with

respect to range carrying capacity, sustained yield forestry management, and other matters therein specified. Conformity to such regulations shall be made a condition of any such lease, permit, or timber sale contract, whether or not such agreement requires the approval of the Secretary of the Interior, and violation of such condition shall render the agreement revocable, in the discretion of the Secretary of the Interior.

(e) To borrow money from the Indian Credit Fund in accordance with the terms of Section 10 of the Act of June 18, 1934 (48 Stat. 984), or from any other Governmental agency, or from any member or association of members of the Tribe, and to use such funds directly for productive tribal enterprises, or to loan money thus borrowed to individual members or associations of members of the Tribe, provided that the amount of indebtedness to which the Tribe may subject itself, other than indebtedness to the Indian Credit Fund, shall not exceed 25,000 dollars, except with the express approval of the Secretary of the Interior.

(d) To engage in any business that will further the economic well-being of the members of the Tribe or to undertake any activity of any nature whatever, not inconsistent with law or with any provisions of this charter.

(e) To make and perform contracts and agreements of every description, not inconsistent with law or with any provisions of this charter, with any person, association, or corporation, with any municipality or any county, or with the United States or the State of Montana including agreements with the State of Montana for the rendition of public services, provided that any contract involving payment of money by the corporation in excess of $5,000 in any one fiscal year shall be subject to the approval of the Secretary of the Interior or his duly authorized representative.

(f) To pledge or assign chattels or future tribal income due or to become due to the Tribe, provided that such agreements of pledge or assignment, other than on agreement with the United States, shall not extend more than ten years from the date of execution and

shall not cover more than one-half the net tribal income from any one source, and provided further that any such agreement shall be subject to the approval of the Secretary of the Interior or his duly authorized representative.

(g) To deposit corporate funds, from whatever source derived, in any national or state bank to the extent that such funds are insured by the Federal Deposit Insurance Corporation, or secured by a surety bond, or other security, approved by the Secretary of the Interior; or to deposit such funds in the Postal Savings Bank or with a bonded disbursing officer of the United States to the credit of the corporation.

(h) To sue and to be sued in courts of competent jurisdiction within the United States; but the grant or exercise of such power to sue and to be sued shall not be deemed a consent by the said Tribe or by the United States to the levy of any judgment, lien or attachment upon the property of the Tribe other than income or chattels specially pledged or assigned.

(i) To exercise such further incidental powers, not inconsistent with law, as may be necessary to the conduct of corporate business.

Termination of Supervisory Powers.

6. Upon the request of the Tribal Council for the termination of any supervisory power reserved to the Secretary of the Interior under sections 3 (b) (3), 3 (c), 3 (e), 3 (f), 3 (g), 3 (h), and section 8 of this charter, the Secretary of the Interior, if he shall approve such request, shall thereupon submit the question of such termination to the Tribe for a referendum vote. The termination shall be effective upon ratification by a majority vote at an election in which at least thirty per cent of the adult members of the Tribe residing on the reservation shall vote. If at any time after five years from the effective date of this charter, such request shall be made and the Secretary shall disapprove it or fail to approve or disapprove it within ninety days after its receipt, the question of the termination of any such power may then be submitted by the Secretary of the Interior or by the Tribal Council to popular referendum of the adult members of the Tribe actually living within the reservation and if the termination is approved by two-thirds of the eligible voters, shall be effective.

Corporate Property.

7. No property rights of the Northern Cheyenne Tribe, as heretofore constituted, shall be in any way impaired by anything contained in this charter, and the tribal ownership of unallotted lands, whether or not

assigned to the use of any particular individuals, is hereby expressly recognized. The individually owned property of members of the Tribe shall not be subject to any corporate debts or liabilities, without such owners' consent. Any existing lawful debts of the Tribe shall continue in force, except as such debts may be satisfied or cancelled pursuant to law.

Corporate Dividends. 8. The Tribe may issue to each of its members a nontransferable certificate of membership evidencing the equal share of each member in the assets of the Tribe and may distribute per capita, among the recognized members of the Tribe, all profits of corporate enterprises or income over and above sums necessary to defray corporate obligations and over and above all sums which may be devoted to the establishment of a reserve fund, the construction of public works, the costs of public enterprises, the expenses of tribal government, the needs of charity, or other corporate purpose. No such distribution of profits or income in any one year amounting to more than $25.00 per capita shall be made without the approval of the Secretary of the Interior. No distribution of the financial assets of the Tribe shall be made except as provided herein or as authorized by Congress.

Corporate Accounts. 9. The officers of the Tribe shall maintain accurate and complete public accounts of the financial affairs of the Tribe, which shall clearly show all credits, debts, pledges, and assignments, and shall furnish an annual balance sheet and report of the financial affairs of the Tribe to the Commissioner of Indian Affairs. The books of the Treasurer shall be open to inspection by members of the Tribe or duly authorized representatives of the Government at all reasonable times.

Amendments. 10. This charter shall not be revoked or surrendered except by act of Congress, but amendments may be proposed by resolutions of the Council which, if approved by the Secretary of the Interior, shall be effective when ratified by a majority vote of the adult members living on the reservation at a popular referendum in which at least 30 per cent of the eligible voters vote.

Ratification. 11. This charter shall be effective from and after the date of its ratification by a majority vote of the adult members of the Northern Cheyenne Tribe living on the Tongue River Reservation, provided at least 30 per cent of the eligible voters shall vote, such ratification to be formally certified by the Superintendent of the Tongue River Agency and the Chairman of the Tribal Council of the Tribe.

Submitted by the Secretary of the Interior for ratification by the Northern Cheyenne Tribe of the Tongue River Reservation in a popular referendum to be held on November 7, 1936.

T. A. WALTERS,
Acting Secretary of the Interior.
[SEAL]

WASHINGTON, D. C., *October 24, 1936.*

CERTIFICATE OF REFERENDUM ELECTION ON ACCEPTANCE OF CHARTER TONGUE RIVER RESERVATION

We, the undersigned, hereby certify that in accordance with instructions of the Acting Secretary of the Interior, as contained in his letter of October 24, 1936 to the Superintendent, and in the corporate charter of the Northern Cheyenne Tribe of the Tongue River Reservation, an election was held on November 7, 1936, for the purpose of voting upon the ratification of the said charter.

We, further certify that at this election 529 votes were cast by qualified electors and that as the total number of eligible voters is 744, the total of the votes cast is more than 30% of the eligible voters.

We further certify that we have completed an official count of these votes, the result of which shows the following:

Votes in favor of the adoption of charter	448
Votes opposed to adoption of charter	73
Votes rejected as illegal or spoiled	8
Total	529

In view of the above, we hereby certify that the aforesaid charter has been duly ratified and has become effective as provided in section 17 of the Act of June 18, 1934 (48 Stat. 984).

CHAS. H. JENNINGS,
Superintendent.
JOE WHITEBEAR,
President of the Tribal Council.
EUGENE FISHER, SR.,
Chairman of Election Committee.
RUFUS WALLOWING,
Member of Election Board.

LAME DEER, MONTANA, *November 9, 1936.*

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This manuscript was followed exactly as submitted.

CLB PUBLISHERS • LAW PRINTING CO.

Supreme Court, U. S.
FILED
MAR 24 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975
No. 75-145

THE NORTHERN CHEYENNE TRIBE,
Petitioner,

v.

WILLIAM HOLLOWBREAST, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

ZIONTZ, PIRTLE, MORISSET,
ERNSTOFF & CHESTNUT

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SUBJECT INDEX

Page

Introduction 1

a. Petitioner's Identity and Purpose 1

b. Petitioner's Legal Position 3

Argument In Reply

1. The Argument That Respondents Acquired Vested Rights to the Minerals "When They Selected the Land and Submitted Their Application" Is Invalid 4

   a. Authorities Dealing With the Power of the Secretary of the Interior to Refuse to Complete Allotment 11

   b. Authorities Relating Neither to the Power of Congress Nor of the Secretary to Terminate Allotment, And Merely Determining Rights Under Existing and Operative Allotment Legislation 14

   c. Decisions and Opinions of the Department of the Interior 16

2. The Argument That the 1926 Congress Was Required to Expressly Reserve A Power to Alter the the Plan For Future Allotment of Minerals Is Invalid. Moreover, Respondents' Reliance on the Terms of Other Allotment Acts Is Misplaced..... 21

   a. The Case Authority Claimed By Respondents to Require A Specific Reservation of A Congressional Power to Alter 22

      i. *Adams v. Osage Tribe* 24

   b. The Other Allotment Acts From Which Respondents Claim This Court May Draw Inferences Regarding the Intent of Congress In Enacting the Northern Cheyenne Allotment Act 30

3. Respondents' Analysis of The Legislative History of The 1926 Act Is Not Sound 34

Page

4. Respondents' Non-Indian Authorities Are Wholly Irrelevant to the Case at Hand 36

5. The Argument That Respondents Acquired Vested Rights In the Minerals Under the 1868 Treaty Is Invalid 39

   a. No Factual Basis 40

   b. No Legal Basis 41

6. The Argument That the 1968 Amendment Subjects Tribal Mineral Development to State Taxation and Therefore Constitutes A "Taking" Is Both Improper And Invalid 41

7. The Argument That "The Tribe's Legislative Authority" Can Adequately Control Any And All Reservation Mineral Development Is At Best Overstated If Not Invalid 46

Conclusion 47

TABLES OF AUTHORITIES

Table of Cases

Adams v. Osage Tribe, 59 F.2d 653 (1932), *cert. denied*, 287 U.S. 652 (1932) 24

Adams v. Osage Tribe, 50 F.2d 918 (D.C. Okla. 1931) 26

Arenas v. United States, 322 U.S. 419 (1944) 8, 11, 23

Arenas v. United States, 60 F. Supp. 411 (D. Cal. 1945) 10

Arnett v. Kennedy, 416 U.S. 134 (1974) 39

Assiniboine & Sioux Tribe v. Nordwick, 378 F.2d 426 (9th Cir. 1967), *cert. denied*, 389 U.S. 1046 (1968) .. 18

Ballinger v. United States ex rel. Frost, 216 U.S. 240 (1910) 11, 12

Benson Mining and Smelting Co. v. Alta Mining and Smelting Co., 145 U.S. 428 (1892) 15

Page

British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159 (1936), *rehearing denied*, 299 U.S. 624 (1937) 44

Chase v. United States, 238 F. 887 (8th Cir. 1916) 7

Chase v. United States, 261 F. 833 (8th Cir. 1919) 7

Chase, Jr. v. United States, 256 U.S. 1 (1921) 6, 41

Clay v. United States, 282 F. 268 (8th Cir. 1922) 7

Confederated Bands of Ute Indians v. United States, 330 U.S. 169 (1947) 43

Crews v. Burcham, 66 U.S. (1 Black.) 352 (1861) 14,15

DeCoteau v. District County Court, — U.S. —, 43 L. Ed. 2d 300, 95 S. Ct. 1082 (1975) .. 30

Doe v. Wilson, 64 U.S. (23 How.) 457 (1859) 14

Elwood v. Flannigan, 104 U.S. (14 Otto) 562 (1881) .. 14

Flemming v. Nestor, 363 U.S. 603 (1960) 39

Garfield v. United States ex rel. Goldsby, 211 U.S. 249 (1908) 13

Goldberg v. Kelly, 397 U.S. 254 (1970) 39

Graham v. Richardson, 403 U.S. 344 (1971) 37, 38, 39

Hynes v. Grimes Packing Co., 337 U.S. 86 (1949) 43

Hy-Yu-Tsi-Mil-Kin v. Smith, 194 U.S. 401 (1904) 16, 18

Jimenez v. Weinberger, 417 U.S. 628 (1974) 37, 38

Leecy v. United States, 190 F. 289 (8th Cir. 1911) 11, 22

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 41

Monson v. Simonson, 231 U.S. 341 (1913) 30

Morrissey v. Brewer, 408 U.S. 471 (1972) 39

Morton v. Mancari, 417 U.S. 535 (1974) 38

Mullen v. Pickens, 250 U.S. 590 (1919) 15

Mullen v. United States, 224 U.S. 448 (1912) 15, 23

Page

Nadeau v. Union Pacific R.R., 253 U.S. 442 (1920)....7, 41

Payne v. Central Pac. Ry., 255 U.S. 228 (1921)....13, 14, 18

Payne v. New Mexico, 255 U.S. 367 (1921).....13, 14, 18

Pka-O-Wah-Ash-Kum v. Sorin, 8 F. 740 (C.C.N.D. Ill. 1881)..... 14

Rosebud Sioux Tribe v. Kneip, 521 F.2d 87 (8th Cir. 1975)..... 30

Shapiro v. Thompson, 394 U.S. 618 (1968).....37, 38

Sherbert v. Verner, 374 U.S. 398 (1963).....38, 39

Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942)..... 43

Sizemore v. Brady, 235 U.S. 441 (1914) 5

Squire v. Capoeman, 351 U.S. 1 (1955) 42, 45

Stephens v. Cherokee Nation, 174 U.S. 445 (1899) 41

United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975) 30

United States v. Arenas, 158 F.2d 730 (8th Cir. 1946), *cert denied*, 331 U.S. 842 (1947) 10

United States v. Chase, 245 U.S. 89 (1917) 41

United States v. Jim, 409 U.S. 80 (1972) 37

United States v. Mazurie, 419 U.S. 544 (1975) 46

United States v. Reynolds, 250 U.S. 104 (1919) 13

Weinberger v. Wiesenfeld, — U.S. —, 43 L.Ed.2d 514, 95 S.Ct. 1225 (1975) 37, 38, 39

Wheeler v. Montgomery, 397 U.S. 280 (1970) 39

Woodward v. DeGraffenried, 238 U.S. 284 (1915) 6, 23

Wyoming v. United States, 255 U.S. 489 (1921)....13, 16, 18

Table of Statutes & Treaties

Page

Act of July 24, 1968, 82 Stat. 424 .....2, 3, 41, 45

Act of October 6, 1964, 78 Stat. 1004 29

Act of September 22, 1961, 75 Stat. 586 45

Act of June 24, 1938, 52 Stat. 1034 29

Act of May 11, 1938, 52 Stat. 347, 25 U.S.C. §§396a-f 44, 45

Act of June 18, 1934, 48 Stat. 984 19

Act of March 2, 1929, 45 Stat. 1478 26

Act of March 3, 1927, 44 Stat. 1347 43-46

Act of June 3, 1926, 44 Stat. 691 .....3, 5, 41, 44

Act of March 3, 1921, 41 Stat. 1249 26

Act of June 4, 1920, 41 Stat. 751 33

Act of June 28, 1906, 34 Stat. 539 31

25 U.S.C. §398c (1927) 42

25 U.S.C. §1302 *et seq.* 47

Treaty With the Southern Cheyenne and Arapaho of October 28, 1867, 15 Stat. 593 40

Treaty With the Sioux (Brulé and other Bands) and Arapaho of April 29, 1868, 15 Stat. 635 40

Treaty With the Northern Cheyenne and Northern Arapaho of May 10, 1868, 15 Stat. 655 39

TABLE OF OTHER AUTHORITIES

Administrative Decisions & Reports

Allotment Selections On the Fort Belknap Indian Reservation, 55 I.D. 295 (1935) 16, 19, 20

The Constitutional Power of Congress to Enact Legislation Concerning the Allotment of Lands to Mission Indians of California, 56 I.D. 102 (1937) 7, 19

Page

DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW (2d ed. 1958) 45

Mineral Reservations In Trust Patents For Allotments to Fort Peck and Uncompahgre Ute Indians, 53 I.D. 538 (1931) 18

Raymond Bear Hill, 52 I.D. 688 (1929) 16, 17, 18

Rights of Indians to Allotments In San Juan County, Utah, 57 I.D. 547 (1942) 17, 20

Patents for Lots In The Village Taholah Quinaielt Reservation Op. Sol. I.D., M27770, May 22, 1935 (unpublished) 19

Books

M. SANDOZ, CHEYENNE AUTUMN (1953) 40

Congressional Bills & Resolutions

H.R. 9558, 69th Cong., 1st Sess. (1926) 36

Congressional Documents & Reports

H.R. REP. No. 468, 66th Cong., 1st Sess. (1919)..... 33

H.R. REP. No. 1043, 66th Cong., 2d Sess. (1920)..... 33

S. REP. No. 1145, 90th Cong., 2d Sess. (1968)..... 35

S. REP. No. 638, 69th Cong., 1st Sess. (1926)..... 36

Congressional Hearings

Hearings on S. 2890 Before the Senate Comm. on Indian Affairs, 66th Cong., 1st Sess. (1919)..... 33

Congressional Record

67 CONG. REC. 9886 (1926)..... 35

59 CONG. REC. 8620 (1920)..... 34

Page

59 CONG. REC. 8160 (1920)..... 34

59 CONG. REC. 8156 (1920)..... 34

59 CONG. REC. 7874 (1920)..... 34

59 CONG. REC. 7845 (1920)..... 34

59 CONG. REC. 6668 (1920)..... 33

59 CONG. REC. 6568 (1920)..... 33

59 CONG. REC. 6010 (1920)..... 33

61 CONG. REC. 2053 (1921)..... 26

Executive Orders

Executive Order of March 19, 1900, I C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 860 (1904)..... 40

Executive Order of November 26, 1884, I C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 860 (1904)..... 40

Scholarly Articles

Comment, *Tribal Property Interests In Executive-Order Reservations: A Compensable Indian Right*, 69 YALE L.J. 627 (1960)..... 44

Ziontz, *Indian Self-Determination: New Patterns For Mineral Development*, INST. ON INDIAN LAND DEVELOPMENT, ROCKY MT. LAW FDN. (1976)..... 45

Tribal Provisions

DEP'T OF THE INTERIOR, CONSTITUTION AND BY-LAWS OF THE NORTHERN CHEYENNE TRIBE OF THE TONGUE RIVER RESERVATION (1957)..... 2

IN THE

Supreme Court of the United States

October Term, 1975
No. 75-145

THE NORTHERN CHEYENNE TRIBE,
Petitioner,

v.

WILLIAM HOLLOWBREAST, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

INTRODUCTION

At the outset, petitioner must voice the strongest possible objections to respondents' complete mischaracterizations of petitioner's identity and purpose in this action, and of the legal position advocated herein by petitioner.

a. Petitioner's Identity and Purpose

Respondents have variously described petitioner as "The Northern Cheyenne Tribe, Inc.",[1] a "fictitious artificial legal

1. Brief for Respondent Class of Northern Cheyenne Indians (hereinafter referred to as Brief For Tribal Respondents) at 3.

corporate entity",[2] an "extended arm of corporate creation, the Tribal Corporation",[3] the "tribal corporation",[4] and finally the "tribal council".[5] These prejudicially inaccurate characterizations, however, should not be permitted to obscure the fact that petitioner is in fact The Northern Cheyenne Tribe, a long-recognized American Indian tribe, governed by a representative system of government which is provided for in a tribally-ratified and federally-approved Constitution.[6] That representative government is embodied in the Northern Cheyenne tribal council, which, under the tribal Constitution, is democratically elected every two years by direct vote of the adult members of the Tribe.[7] Furthermore, if petitioner prevails herein, the mineral wealth of the Northern Cheyenne Reservation will remain subject to legislative strictures calculated to assure that it will inure to the benefit of all the Northern Cheyenne people:

> The coal or other minerals, including oil, gas and other natural deposits, on said reservation are hereby reserved in perpetuity for the benefit of the tribe and may be leased with the consent of the Indian council for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a-f), under such rules, regulations, and conditions as the Secretary of the Interior may prescribe.[8]

2. *Id.* at 24-25.

3. *Id.* at 23.

4. *Id.* at 4, 11, 18, 25, 35, 37, 38, 42.

5. Brief for Respondents Williamson and Bowen at 4, 5, 45, 47, 48, 49, 50, 54.

6. DEP'T OF THE INTERIOR, CONSTITUTION AND BY-LAWS OF THE NORTHERN CHEYENNE TRIBE OF THE TONGUE RIVER RESERVATION, art. III, §§1-2 (1957).

7. *Id.* art. VI.

8. Act of July 24, 1968, §1, 82 Stat. 424 (*See* Brief for Petitioner at A-6).

> [A]ll the income of said tribe from rents, royalties, or other profits accruing from the sale of any timber, coal, or other minerals, including oil, gas, and other natural deposits herein reserved for the benefit of the said Indians . . . shall be deposited in the Treasury of the United States to the credit of the Northern Cheyenne Indians and be subject to expenditure for their benefit in such manner as Congress may direct. . . .[9]

This action, brought reluctantly by the Northern Cheyenne Tribe solely because of Congressional mandate,[10] is, therefore, decidedly *not* an effort by a "tribal corporation" or "tribal council" to wrest from the people the benefits of mineral development. On the contrary, this action is brought to assure that the mineral wealth of the reservation will in fact remain with, and be enjoyed by, *all* Northern Cheyennes.

b. Petitioner's Legal Position

Respondents assert that it is petitioner's position that Congress' plenary power over Indian lands is "unbridled",[11] "unlimited",[12] and not subject to the Fifth Amendment,[13] such that Congress may "abrogate any vested rights".[14] This is a gross mischaracterization. Petitioner's position, stated in general terms, is as follows:

(1) the mere enactment of a statutory scheme contemplating allotment does not, in and of itself, vest rights to allotment protected by the Fifth Amendment;

(2) so long as this statutory scheme remains executory, Congress has inherent authority to alter it in light of chang-

9. Act of June 3, 1926, §4, 44 Stat. 691-92 (*See* Brief for Petitioner at A-3).

10. Act of July 24, 1968, §2, 82 Stat. 425 (*See* Brief for Petitioner at A-6).

11. Brief for Respondents Williamson and Bowen at 56, 58.

12. *Id.* at 59.

13. *Id.* at 82-83.

14. *Id.* at 61.

ing conditions, the welfare of the Indians, and the public interest;

(3) however, to the extent that the statutory allotment scheme is in fact carried into effect, rights protected by the Fifth Amendment are vested in the allottees.

Moreover, and more particularly, it is grossly inaccurate to state that it is petitioner's position that Congress has power "to terminate *any* property rights on the Northern Cheyenne Indian Reservation",[15] and that "all [those] property rights [are] dangling perpetually at the Congressional whim".[16] On the contrary, petitioner in fact contends *only* that insofar as the 1926 Northern Cheyenne allotment scheme remains executory, Congress retains authority to alter that scheme. Since in 1968 the statutory plan for allotment of tribal minerals was still executory, Congress had full power to change that plan.

1. *The Argument*[17] *That Respondents Acquired Vested Rights To the Minerals "When They Selected the Land and Submitted Their Application" Is Invalid.*

Respondents Williamson and Bowen argue that they acquired vested rights in the minerals beneath their allotments at some unspecified time between the enactment of the 1926 Act and June 18, 1934.[18] This argument is based on the asserted general principle that vested rights arise from the filing of an application for allotment. However, this conclusion is unsupported by the authorities—even those cited by respondents.

15. Brief for Respondents Williamson and Bowen at 37.
16. *Id.*
17. Brief for Respondents Williamson and Bowen at 30-32, 59-61, 68-70, 77-79.
18. Brief for Respondents Williamson and Bowen at 32.

Respondents rely heavily on *Sizemore v. Brady*, 235 U.S. 441 (1914). However, without question *Sizemore* does *not* propound, as respondents claim, a general rule that rights vest on application for allotment. Rather, the case simply affirms and applies the well-established proposition that Congress retains inherent continuing power to alter unconsummated statutory plans for allotment.

The key to the *Sizemore* analysis was this Court's observation that the involved allotment plan contemplated that certain interim events were to occur before individual property rights were to come into existence. So long as Congress altered its plan for the creation of those rights prior to the occurrence of those interim events, the alteration invaded no vested rights:

> [Congress' allotment plan] contemplated that *various preliminary acts* were to precede any investiture of individual rights. The lands and funds to which it related were tribal property and only as it was *carried into effect* were individual claims to be fastened upon them. Unless and until *that* was done Congress possessed plenary power to deal with them as tribal property. It could revoke the agreement and abandon the purpose to distribute them in severalty, or adopt another mode of distribution, or pursue any other course which to it seemed better for the Indians. [emphasis added][19]

Precisely analogous to the occurrence of the "various preliminary acts" contemplated in the *Sizemore* allotment plan is the expiration of the fifty-year period contemplated in the Northern Cheyenne allotment plan.[20]

Respondents Williamson and Bowen strain to character-

19. 235 U.S. at 449.
20. It is only upon the expiration of this fifty-year period that the minerals and natural deposits "*become* the property of the respective allottees or their heirs" in the Northern Cheyenne allotment plan. Act of June 3, 1926, 44 Stat. 690 (Brief for Petitioner at A-2) (emphasis added).

ize *Sizemore* as holding generally that the filing of an allotment application extinguishes Congress' power to alter executory aspects of the allotment plan. Plainly, there is no such holding in *Sizemore*. This Court simply held that heirs under Creek law acquired no vested rights to allotment, and that, therefore, Congress could supplant them with heirs under Arkansas law. There was no issue as to the nature of the resulting interest acquired by the heirs under Arkansas law. Accordingly, *Sizemore* neither held, nor indicated in dicta, that the Arkansas law heirs held vested rights to allotment.[21]

Respondents Williamson and Bowen also assert that this Court's 1921 decision, *Chase, Jr. v. United States*, 256 U.S. 1, holds that rights to allotment vest with the filing of an allotment application.[22] This assertion, however, is not only baseless, but flatly contradictory to the holding in that case. In fact, *Chase, Jr.* held that Congress may indeed cut off pending allotment applications through the exercise of its well-established continuing power to repeal allotment legislation.

The facts and procedural history in *Chase, Jr.* were as follows. Congress enacted allotment legislation for the

21. Respondents Williamson and Bowen attempt to extract such a holding by mischaracterizing the issue in *Sizemore* as: "Did Grayson's (or his estate's) right in the allotment vest prior to *or after* the amendment of the intestacy laws?" (emphasis added). Brief for Respondents Williamson and Bowen at 68 note 132. However, the *Sizemore* Court made no determination whatsoever of the nature of the rights "after" the amendment. This is, in fact, conceded by respondents Williamson and Bowen in their succeeding footnote. Brief for Respondents Williamson and Bowen at 69 note 133.

Subsequently, in *Woodward v. DeGraffenried*, 238 U.S. 284 (1915), which dealt with the allotment legislation involved *Sizemore*, this Court held that certain Creek law heirs had acquired vested rights. This holding, however, was based on a significantly different fact situation which is discussed at pages 23-24, *infra*.

22. Brief for Respondents Williamson and Bowen at 57 note 115.

Omaha Tribe in 1882 and 1893. Chase, Jr., a tribal member, submitted an application for an eighty-acre allotment. This application was denied by the Secretary of the Interior; hence, in 1910, Chase, Jr. brought suit. The trial court dismissed, but in 1916 the Eighth Circuit reversed—holding that Chase, Jr. was entitled to an allotment of forty of the eighty acres under the terms of the 1882 act.[23] However, in the interim, Congress in 1912 had enacted a statute providing for the sale (rather than allotment) of all unallotted reservation lands. On remand from the Eighth Circuit, the United States (for the first time) introduced this 1912 act as an absolute defense. The Eighth Circuit affirmed the dismissal of Chase, Jr.'s complaint on the ground that the 1912 act had repealed the 1882 allotment provisions and had extinguished Chase, Jr.'s prior right to an allotment under the 1882 act.[24] In this Court, Chase, Jr. contended:

> [He] had a vested right to an allotment "under the treaties and acts of Congress as they existed at the time when" the allotment was "selected and claimed".[25]

This claim was denied on the ground that Chase, Jr.'s "mere right under the Act of 1882" was subject to the continuing power of Congress to alter its statutory allotment plans in light of changing conditions.[26]

Additionally, respondents cite *Nadeau v. Union Pacific R. R.*, 253 U.S. 442 (1920), as a case decided on the basis

23. *Chase v. United States*, 238 F. 887 (8th Cir. 1916).

24. *Chase v. United States*, 261 F. 833 (8th Cir. 1919).

25. 256 U.S. at 6.

26. 256 U.S. at 7-8. In *Clay v. United States*, 282 F. 268 (8th Cir. 1922), this reasoning was applied to other Omaha allotment selections. *See The Constitutional Power of Congress to Enact Legislation Concerning the Allotment of Lands to the Mission Indians of California*, 56 I.D. 102, 109 (1937).

of respondents' asserted general principle that rights vest upon selection of an allotment.[27] However, respondents' analysis is again faulty. *Nadeau* involved an 1861 treaty which "contemplated future allotments."[28] Allotments were selected in 1862 and 1863.[29] In 1864, the Secretary approved the allotments. Contrary to respondents' characterization of this case, this Court in fact held that Congress retained continuing power to alter the treaty allotment plan after allotments were selected:

> It seems plain that, at least, until actually allotted in severalty (1864) the lands were but part of the domain held by the Tribe. . . . The power of Congress, as guardian for the Indians, to legislate in respect of such lands is settled. *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U.S. 641, 653; *United States v. Rowell*, 243 U.S. 464, 468; *United States v. Chase*, 245 U.S. 89.[30]

Similarly, respondents Williamson and Bowen completely mischaracterize this Court's 1944 decision, *Arenas v. United States*, 322 U.S. 419. Respondents contend that *Arenas* "established beyond doubt that Indian allottees' rights vest upon filing their allotment application;"[31] and respondents further contend that in *Arenas* "this Court compelled recognition of the applicant's interest in an allotment by requiring issuance of the trust patent."[32] However, neither of these contentions is correct—this Court neither announced a rule of vesting, nor mandated issuance of a

27. Brief for Respondents Williamson and Bowen at 57 note 116.

28. 253 U.S. at 446.

29. The treaty provided that a census be taken to indicate those Indians desiring allotment and that, thereafter, lands be assigned to the applicants; the census and assignments occurred between July, 1862, and November, 1863. 253 U.S. at 445.

30. 253 U.S. at 446.

31. Brief for Respondents Williamson and Bowen at 32.

32. Brief for Respondents Williamson and Bowen at 78.

trust patent. Rather, *Arenas* simply held that the prevailing congressional policy regarding Mission Indian allotment, as expressed in the operative federal legislation, was that such allotment should be made;[33] that to the extent that the legislation lodged discretion in the Secretary of the Interior regarding whether to allot, he had already exercised that discretion in favor of allotment;[34] and, finally, that a subsequent reversal in secretarial policy could not defeat the will of Congress:

> It appears that the sole reason for denying a patent is a departmental change of policy, by which the Secretary now disagrees with the allotment policy prescribed for these Indians by the Acts of 1891 and 1917. . . .
>
> The Secretary has endeavored to persuade Congress that treatment other than the allotment policy embodied in its legislation would be more advantageous for the Indians. [The Secretary's failures, in 1935 and 1937, to convince Congress to repeal the allotment legislation are then detailed].
>
> We think the grounds advanced by the Government . . . are inadequate to establish as a matter of law that the petitioner has no legal right to a patent. Congress not only has failed to deny these allotment rights by legislation, but has rejected urgent and reiterated appeals from the Department to do so.[35]

Having thus denied the Secretary's claim that departmental policy should be permitted to prevail over congressional policy, this Court remanded the case for trial on the following legal standard:

> Arenas is entitled to invoke the applicable legislation as it stands in determining whether he is entitled to

33. 322 U.S. at 425-26.

34. *Id.* at 427, 428.

35. *Id.* at 432-33.

> have completed the all but fully executed policy of allotment [footnote omitted].[36]

Contrary to respondents' assertion, this Court did not in any sense whatsoever hold—let alone "establish beyond doubt"—that rights vest upon the filing of an application for allotment. Nor did this Court compel issuance of the trust patent.[37]

Thus, the *Arenas* opinion suggests a fundamental difference between the following two issues: (1) the power of the Secretary of the Interior to refuse to complete unconsummated allotments provided for by existing and operative allotment legislation; vis-a-vis (2) the power of the Congress to terminate unconsummated allotments through the repeal of allotment legislation.

The instant case deals with this second issue. The authorities relevant to this issue, and confirming this congressional power, have been set forth at length in the Brief for Petitioner. Respondents Williamson and Bowen's authorities, however, are in fact not germane to this issue of congressional power. Many of them are, instead, relevant only to

36. *Id.* at 433-34.

37. On remand, the Secretary was ordered to approve the allotments. *Arenas v. United States*, 60 F.Supp. 411 (S.D. Cal. 1945). On appeal to the Eighth Circuit, the United States conceded that this Court's prior opinion "construed the 1917 Act. . . as removing from [the Secretary] discretion as to whether allotments should be made at all." *United States v. Arenas*, 158 F.2d 730, 739 (8th Cir. 1946). The Eighth Circuit found:

> The "full record" in this case clearly established that "a departmental change of policy" was the real reason behind the disapproval of the 1927 allotment.

Id. at 744. Finally, the Eighth Circuit concluded that under the applicable standard for determining Arenas' allotment rights—"the applicable legislation as it stands" (*Id.* at 746)—Arenas was entitled to the issuance of a patent. Subsequently, this Court denied certiorari. 331 U.S. 842 (1947).

the first issue—the power of the Secretary of the Interior. Moreover, respondents' remaining authorities are but relevant to yet another distinct issue—relating neither to the power of Congress to terminate allotment, nor to the power of the Secretary to override allotment. These authorities simply deal with defining the nature of an Indian's rights under specific existing and operative allotment provisions—determining, for example, the power of an Indian to convey, or otherwise transact with respect to, his allotment expectancy under an existing legislative provision. This will now be demonstrated.

a. Authorities Dealing With the Power of the Secretary of the Interior to Refuse to Complete Allotment

Respondents Williamson and Bowen rely on *Leecy v. United States*, 190 F. 289 (8th Cir. 1911), *appeal dismissed* 232 U.S. 731 (1914), and *Ballinger v. United States ex rel. Frost*, 216 U.S. 240 (1910), as limiting the power of Congress to alter allotment plans.[38] However, as does *Arenas v. United States*, 322 U.S. 419 (1944) (discussed at 8-10 *supra*), these cases simply stand for the proposition that an Executive officer—the Secretary of the Interior—lacks the power to thwart allotment mandated by existing and operative allotment legislation; these cases decidedly do not deal with Congress' power to amend allotment plans.

In *Leecy*, plaintiff was held to unquestionably have a right, under existing allotment legislation, to an allotment of certain selected lands. However, the Secretary refused to make that allotment on the ground that he had reserved these lands from allotment. The Eighth Circuit reasoned as follows:

38. Brief for Respondents Williamson and Bowen at 42, 62.

> The power of Congress over the whole subject of our relations to the Indians is plenary. *Lone Wolf v. Hitchcock,* 187 U.S. 553, 23 Sup. Ct. 216, 47 L. Ed. 299. But it does not follow, because Congress makes a valid law and intrusts its execution to the head of an executive department, with power to make rules and regulations for its execution, that he is thereby clothed with plenary power to make such rules and regulations as would not aid in the execution of the law but nullify its provisions. . . .
>
> Congress authorized the allotment of these lands, and if the Secretary of the Interior could under his authority withdraw a portion of them from allotment, he could withdraw substantially all of them, if that seemed in his judgment best, and under the contention of the government he would be executing an allotment law under rules and regulations prescribed, when in fact he nullified the law by withdrawing the very land from allotment which Congress had authorized to be so distributed. The law was to be executed under, not nullified by, rules and regulations.[39]

The opinion concluded:

> A strong argument is made tending to show that power should be vested in the President or some other officer of the government to withhold from allotment lands specially needed for the use of the tribe as a whole, but such arguments should be addressed to Congress rather than to the courts. If such a law would be wise, that is no reason why an executive department should make one, or the courts sustain it in doing so.[40]

Similarly, in *Ballinger v. United States ex rel. Frost,* 216 U.S. 240 (1910), this Court struck down another secretarial attempt to override a congressional allotment policy embodied in operative allotment legislation. In this case, under the existing allotment act, an allotment had been selected, a certificate of allotment had been issued, and a

39. 190 F. at 292.
40. *Id.* at 293.

patent had been executed. Thereupon, by the express terms of the allotment act, the allottee's title was fixed and absolute.[41] Subsequently, the Secretary of the Interior purported to withdraw the involved lands from allotment. Finding no authority for such secretarial action in the applicable legislation, this Court held:

> Whenever, in pursuance of the legislation of Congress, rights have become vested, it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department. However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of Congressional legislation.[42]

Respondents also cite *Payne v. Central Pac. Ry.,* 255 U.S. 228 (1921), *Payne v. New Mexico,* 255 U.S. 367 (1921), and *Wyoming v. United States,* 255 U.S. 489 (1921), as supporting respondents' proposition that "upon filing a sufficient application" rights are vested which are not subject to further alteration by congressional action.[43]

41. 216 U.S. at 247, 249. *See United States v. Reynolds,* 250 U.S. 104, 108-09 (1919).

42. 216 U.S. at 249. *See Garfield v. United States ex rel. Goldsby,* 211 U.S. 249 (1908), where this Court characterized this kind of issue as follows:

> In our view this case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the acts of Congress. . . [A]s has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action.

211 U.S. at 262.

43. Brief for Respondents Williamson and Bowen at 72-73, 31 note 58, 31 note 59, 31 note 61. As demonstrated in the Brief For Petitioner at 51, in these cases this court found vested rights on the basis that, in connection with their selections, the applicants each parted with valuable consideration. For example, this Court stated in *Wyoming v. United States*:

> Acceptance of such a [statutory] proposal and full compliance

These public lands cases, however, each involve efforts by the Secretary of the Interior or the Commissioner of the General Land Office to block selections made under fully operative federal legislation. The power of Congress to amend that legislation was not in issue.

b. Authorities Relating Neither to the Power of Congress Nor of the Secretary to Terminate Allotment, and Merely Determining Rights Under Existing and Operative Allotment Legislation

Respondents Williamson and Bowen cite the decisions *Doe v. Wilson*, 64 U.S. (23 How.) 457 (1859), *Crews v. Burcham*, 66 U.S. (1 Black.) 352 (1861), *Elwood v. Flannigan*, 104 U.S. (14 Otto) 562 (1881), and *Pka-O-Wah-Ash-Kum v. Sorin*, 8 F. 740 (C.C.N.D. Ill. 1881), in support of their claim that Congress in 1968 could not alter the 1926 Northern Cheyenne allotment plan.[44] These cases each involve lands reserved to individual Pottawatomie Indians under a treaty of 1832. Each case deals only with the power of the Indian beneficiary of that reservation to convey his reserved lands prior[45] to actual selection of the reserved

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> therewith confer vested rights which all must respect. Equity then regards the State as the owner of the selected tract and the United States as owning the [relinquished tract]. . .Of course, the State's right under the selection was precisely the same as if in 1912 it had made a cash entry of the selected land under an applicable statute, for the waiver of its right to the tract in the forest reserve was the equivalent of a cash consideration.

255 U.S. at 497. *See Payne v. Central Pac. Ry.*, 255 U.S. 228, 235-36 (1921), and *Payne v. New Mexico*, 255 U.S. 367, 370 (1921).

44. Brief for Respondents Williamson and Bowen at 11 note 24, 31 note 63, 78.

45. Therefore, contrary to respondents Williamson and Bowen's claims, the cases do not involve the rights of allottees who have "selected the parcel and file a proper application." (Brief For Respondents Williamson and Bowen at 11).

lands.[46] The power of Congress (or of the Secretary) to alter or otherwise affect the individual Indian's interest in the reserved lands was simply not at issue in these cases.

Mullen v. United States, 224 U.S. 448 (1912), is also cited by respondents in support of their claim that Congress lacked power to alter the 1926 Northern Cheyenne allotment plan.[47] This case too deals only with the power of an individual Indian to convey lands distributed to him —in this instance, lands which had been alloted[48] to him under existing and operative allotment legislation. This Court simply interpreted the operative allotment legislation and concluded that a power to transfer existed. There was no issue as to Congress' power to subsequently limit the allottee's right to convey; on the contrary, the only subsequent congressional action specifically confirmed that right.[49]

Additionally, respondents Williamson and Bowen cite the public lands decision *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U.S. 428 (1892), as limiting the power of Congress in the premises. This case, however, was simply a dispute between competing applicants for public lands under existing legislation—congressional (or even secretarial) power was not at issue. The applicant who had "made application to the proper land

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46. Such a power was found to exist on the basis that the treaty right to the reservation was founded upon valuable consideration and that a subsequent act of Congress specifically granted a power to convey. *Crews v. Burcham*, 66 U.S. (1 Black.) 352, 356-57. *See Mullen v. Pickens*, 250 U.S. 590, 594-95 (1919).

47. Brief For Respondents Williamson and Bowen at 12 note 31, 40 note 81, 78.

48. The case was decided on the basis that the lands had in fact been allotted prior to the transfer in question. 224 U.S. at 457.

49. 224 U.S. at 457-58. *See Mullen v. Pickens*, 250 U.S. 590, 595 (1919).

office for a United States patent, paid the price required by law, and obtained the ordinary certificate of purchase"[50] prevailed on the following rule of public lands law:

> It is a general rule, in respect to the sales of real estate, that when a purchaser has paid the full purchase price his equitable rights are complete, and there is nothing left in the vendor but the naked legal title, which he holds in trust for the purchaser. And this general rule of real estate law has been repeatedly applied by this court to the administration of the affairs of the Land Department of the government. . . .[51]

Similarly respondents Williamson and Bowen also cite the case *Hy-Yu-Tse-Mil-Kin v. Smith*, 194 U.S. 401 (1904), as limiting the power of Congress to alter allotment plans.[52] That case, however, is not in any sense concerned with the power of Congress (or of the Secretary) to amend such provisions. *Hy-Yu-Tse-Mil-Kin* deals only with the question of whether or not a particular Indian was qualified for allotment under an existing and operative allotment act.[53]

Finally, the decisions of the Department of the Interior relied on by respondents Williamson and Bowen will now be addressed.

c. Decisions and Opinions of the Department of the Interior

Respondents Williamson and Bowen rely on three Department of the Interior decisions and opinions, *Raymond Bear Hill*, 52 I.D. 688 (1929), *Allotment Selections on the*

50. 145 U.S. at 429.

51. 145 U.S. at 432. *See Wyoming v. United States*, 255 U.S. 489, 497-98 (1921).

52. Brief For Respondents Williamson and Bowen at 62, 11 note 24, 31 note 63, 78.

53. This Court held that the Indian was entitled to allotment of lands which had been previously denied her under an erroneous departmental interpretation of the allotment act.

Fort Belknap Indian Reservation, 55 I.D. 295 (1935), and *Rights of Indians to Allotments In San Juan County, Utah*, 57 I.D. 547 (1942), as authority for the proposition that when the original Northern Cheyenne allottees applied for their allotments, Congress lost the authority to repeal the provision calling for the future allotment of minerals.[54] However, the following points must be made in regard to these Interior decisions and opinions:

(1) Assuming *arguendo* that these Interior decisions and opinions establish such a principle, that principle would in any event be in conflict with the relevant decisions of this Court, set forth in the Brief for Petitioner and in this Reply Brief, which establish Congress' power to enact the 1968 Amendment. Thus, if the Interior decisions and opinions held as respondents argue, they would be entitled to no weight.

(2) Moreover, respondents' analyses of these decisions and opinions is, in fact, both incorrect and incomplete. Respondents have not only mischaracterized their holdings, but have also failed to cite other relevant Interior decisions which explain, narrow, or are in conflict with these three decisions. This will now be demonstrated.

Raymond Bear Hill involves the interpretation of an amendment to an allotment act. The original allotment act provided for the immediate[55] allotment of tribal lands including minerals. The subsequent amendment reserved from allotment the oil and gas in "undisposed of" lands.

54. Brief For Respondents Williamson and Bowen at 30, 31 note 61, 31 note 62, 62, 79.

55. In the Northern Cheyenne Allotment Act of 1926, Congress specifically withheld immediate allotment of minerals—this key factual difference of and by itself makes *Raymond Bear Hill*, at best, marginally relevant to the instant case.

The opinion, in essence, made nothing more than an interpretation of the amendment language "undisposed of." It concluded that the statutory term encompassed all lands which had not, as of the time of the amendment, been validly selected for allotment. However, in reaching this conclusion, the First Assistant Secretary seemed to postulate a rule that, upon selection, certain rights are acquired which are insulated from further Congressional action. Although he cited no direct authority for this proposition, the First Assistant Secretary did cite *Wyoming v. United States,* 255 U.S. 489 (1921), *Payne v. New Mexico,* 255 U.S. 367 (1921), *Payne v. Central Pac. Ry.,* 255 U.S. 228 (1921), and *Hy-Yu-Tse-Mil-Kin v. Smith,* 194 U.S. 401 (1904), in support of his proposition. These cases, however, as has been demonstrated in this Reply Brief (at 13-14, 16 *supra*), provide no support for the First Assistant Secretary's postulate.

Moreover, two-and-a-half years later, in another opinion on the issue involved in *Raymond Bear Hill,* the First Assistant Secretary clearly appears to have retreated from his proposed rule of law that rights vest on selection—relying instead, simply on the prior departmental interpretation of the statutory term "undisposed of." *Mineral Reservations In Trust Patents For Allotments to Fort Peck and Uncompahgre Ute Indians,* 53 I.D. 538 (1931). Thus, by 1931, the Department itself had tacitly acknowledged the infirmity of the suggested rule of vesting in *Raymond Bear Hill.*[56]

56. *See also Assiniboine & Sioux Tribe v. Nordwick,* 378 F.2d 428 (9th Cir. 1967), *cert. denied* 389 U.S. 1046 (1968), involving the same allotment legislation. The Ninth Circuit held that the reservation of minerals on "undisposed of" lands did not apply to lands as to which there had been a prior homestead entry. This holding was purely an interpretation of the statutory language. The Court acknowledged, however, that Congress had the power to reserve minerals on such entered lands. 378 F.2d at 428-29.

Respondents also rely on the opinion of the Solicitor of the Department of the Interior, *Allotment Selections On The Fort Belknap Indian Reservation,* 55 I.D. 295 (1935), to support their argument that rights to the future minerals allotment vested at the time of selection. This opinion, however, is really nothing more than an interpretation of the provision in the Indian Reorganization Act of 1934[57] prohibiting further allotment of Indian lands. The issue was simply whether or not Congress intended this bar to apply to twenty-five specific allotment selections which had been pending for nine years. It was held that Congress did not intend to bar the completion of these allotments;[58] and, although the opinion does include some discussion of the nature of the right acquired by selection, it did *not* hold that selection deprives Congress of the power to subsequently alter the allotment plan. In fact, less than two months before issuance of this opinion, the Solicitor specifically held that the Indian Reorganization Act provision prevented the Secretary from issuing allotment patents on the Quinault Indian Reservation. *Patents For Lots In The Village Of Taholah Quinaielt Reservation,* Op. Sol. I.D., M.27770, May 22, 1935 (unpublished).

Moreover, two years later in *The Constitutional Power Of Congress To Enact Legislation Concerning The Allotment Of Lands To Mission Indians Of California,* 56 I.D. 102 (1937), the Solicitor explicitly acknowledged the absence of any court or departmental decision which, on constitutional grounds, militated against the enactment of legislation cutting-short the completion of allotment of

57. Act of June 18, 1934, § 1, 48 Stat. 984.

58. 55 I.D. at 300, 304.

pending selections.[59] The Solicitor held:

> Mere selection thus is not enough to establish a vested property right in the individual Indian. The land in addition must be set apart to the allottee, and this is usually accomplished by the issuance of a trust patent for the land after the allotment selection has been approved by the Secretary of the Interior.[60]

Finally, respondents cite *Rights Of Indians To Allotments In San Juan County, Utah*, 57 I.D. 547 (1942), in support of their claim that selection prohibits further congressional action. This Solicitor's opinion, however, announces no such rule. At issue were public lands allotments to Indians and a 1933 act which prevented "further allotments" of that sort in San Juan County. In fact, the Solicitor's opinion did no more than interpret the 1933 act as not applying to the involved allotment applications. These applications had been filed in 1930 after the applicants had settled on the land. The Secretary of the Interior refused to approve the applications in anticipation of the enactment of further legislation dealing with these allotments. In the course of his analysis, the Solicitor found that under the allotment act and then-applicable regulations, the Indian was entitled to prompt approval and the Secretary had no discretion to deny this approval. The Solicitor carefully pointed out that his analysis was based on principles

59. This 1937 Solicitor's opinion described the holding in *Allotment Selections On The Fort Belknap Indian Reservation*, 55 I.D. 295 (1935), in the following terms:

> That opinion, however, rested primarily on the premise that the inhibition against further allotments was not intended to prevent the completion of allotments, mandatorily provided for in the Fort Belknap allotment act, for the benefit of the few remaining unallotted Indians whose right to allotment under the allotment act became fixed long prior to the passage of the prohibitory leglislation.

56 I.D. at 107.

60. 56 I.D. at 109.

governing settlement upon public lands, and, that the rules governing the allotment of tribal property were quite different.[61] Under public lands law, it was the act of settlement which created rights in the Indian. Moreover, the opinion specifically states that the application itself conferred no rights:

> An application without more confers no right on anyone. But an application by an Indian qualified under the statute and supported by settlement as required by the statute confers upon the applicant an absolute right to allotment and patent.[62]

2. *The Argument[63] That the 1926 Congress Was Required to Expressly Reserve a Power to Alter the Plan For Future Allotment of Minerals Is Invalid. Moreover, Respondents' Reliance On the Terms of Other Allotment Acts Is Misplaced.*

Respondents claim that the congressional power to alter the 1926 plan for future allotment of the minerals "must be specifically set forth in the [1926] allotment act".[64] This claim is made on two bases:

(a) case authority allegedly mandating such an express reservation of power;[65] and

(b) the terms of certain other allotment acts which, respondents argue, may be used for the purpose of drawing

61. The Solicitor's opinion states:

> While it is true that there are departmental decisions containing statements to the effect that no vested rights are acquired by the mere filing of an application for allotment, most of these decisions deal with allotments of Indian lands, the authority of Congress to change the conditions under which allotments may be made, and the power of Congress to include reservations in patents issued in pursuance of selections.

57 I.D. at 550.

62. 57 I.D. at 551.

63. Brief for Respondents Williamson and Bowen at 40-44.

64. *Id.* at 40.

65. *Id.* at 40, 41-42.

an inference regarding Congress' intent in enacting the Northern Cheyenne Allotment Act of 1926.[66]

However, as will be demonstrated below, both these analytical bases are faulty.

Moreover, assuming *arguendo* that respondents' theory is correct, the 1926 Congress did expressly declare—in sections 1 and 3 of the 1926 Act—its continuing power over the allotment plan. Indeed, the section 3 declaration immediately follows, and clearly qualifies, the provision announcing the plan to transfer the minerals and natural deposits fifty-years hence.[67]

a. The Case Authority Claimed By Respondents to Require a Specific Reservation of a Congressional Power to Alter

The Brief for Petitioner[68] sets forth the substantial body of decisions of this Court which affirms Congress' inherent continuing power to adjust enacted schemes for the allocation of tribal property in view of changing conditions. The cases cited by respondents Williamson and Bowen do not detract from this principle.

Respondents cite *Leecy v. United States*, 190 F. 298 (8th Cir. 1911), as a "rather pointed rejection of any implied power of the federal government" to alter allotment legislation.[69] However, this case, as already demonstrated in this Reply Brief,[70] was not in any sense concerned with the power of Congress. *Leecy*, in fact, was an unequivocal rejection of any power in an *Executive officer*—

66. *Id.* at 40, 42-44.
67. *See* Brief for Petitioner at 17-18.
68. *Id.* at 37-39.
69. Brief for Respondents Williamson and Bowen at 42.
70. *See* pages 11-12 *supra*.

the Secretary of the Interior—to thwart completion of allotment required under existing and operative legislation; the power of *Congress* was simply not in issue.

Similarly, respondents state that *Arenas v. United States*, 322 U.S. 419 (1944), "rejected any implied federal power" to amend allotment provisions.[71] But this case too dealt only with the power of the *Secretary* to refuse to comply with congressional allotment policy embodied in existing law.[72] *Arenas*, like *Leecy*, did not in any sense deal with the power of *Congress* to amend allotment legislation.

Respondents cite *Mullen v. United States*, 224 U.S. 448 (1912), as standing for the proposition that a congressional power to amend allotment legislation "may not be inferred from Congress' general plenary power."[73] However, as already demonstrated in this Reply Brief,[74] the congressional power to amend was not in issue in *Mullen*—this Court simply interpreted the existing and operative allotment legislation to determine an allottee's power to alienate his allotment.

However, respondents do cite *Woodward v. DeGraffenried*, 238 U.S. 284 (1915), which did actually involve a congressional alteration of an allotment plan. But, contrary to respondents' claim, this case did not in fact deal with or discuss the question of whether Congress must specifically reserve a power to amend. Rather, the case is merely illustrative of an instance in which allotments under an agreement ratified by statute had been so far consummated as to preclude subsequent divestment by Congress. In this case,

71. Brief for Respondents Williamson and Bowen at 42.
72. *See* pages 8-10 *supra*.
73. Brief for Respondents Williamson and Bowen at 40 note 81.
74. *See* page 15 *supra*.

an allotment had been selected and a certificate of allotment had been issued. Subsequently, an agreement providing for general allotment of all tribal lands was negotiated and ratified by the Indians and Congress. This Court found that the tribe and the United States intended by that agreement to fully confirm previously made allotments. Moreover, where an original allottee had died prior to adoption of the agreement (as was the case in *Woodward*), the agreement specifically confirmed title to the allotment in the heirs under Creek law. In these circumstances, it was held that Congress could not later supplant these Creek law heirs by Arkansas law heirs. Thus, in an instance where the allotment had been fully selected, confirmed in the original allottee through the issuance of a certificate of allotment, and then, on the basis of a fully-ratified agreement, completely confirmed in specific heirs, this Court held that Congress could not subsequently strip the heirs of that allotment. The instant case, dealing merely with a statutory plan for a future allotment of minerals, is clearly distinguishable.

Respondents' remaining authority for the proposition that Congress must specifically reserve a power to amend allotment legislation is the Tenth Circuit decision, *Adams v. Osage Tribe*, 59 F.2d 653 (1932), *cert. denied*, 287 U.S. 652 (1932). Since *Adams* is factually very close to the case at hand, it will be discussed in some detail.

i. *Adams v. Osage Tribe*

Adams upheld, against Fifth Amendment attack, two amendments of the Osage Allotment Act of 1906;[75] each amendment extended the period of tribal ownership of

75. Act of June 28, 1906, 34 Stat. 539.

minerals beneath allotted lands. Respondents Williamson and Bowen assert that the Tenth Circuit made its decision "because" Congress expressly reserved a power to so amend the original allotment act.[76] This is an erroneous characterization of the Tenth Circuit's analysis, for the following reasons.

First, the second amendment at issue in *Adams* was in fact *not* based upon an existing and operative express reservation of power to amend. This is revealed by careful analysis of the two involved amendments. The 1906 act promulgated a plan for the ultimate distribution in severalty of the lands and funds of the tribe. Each tribal member was permitted three allotment selections of 160 acreas each, and an additional pro-rata distribution of the remaining lands;[77] one selection was to be an inalienable and nontaxable "homestead"; the remainder of the allotment, termed "surplus", was to be alienable and taxable in the event the allottee were declared "competent".[78] The "competency" provision specifically barred the sale of minerals, reserved them to the tribe for twenty-five years, and provided that the minerals would "become" the property of the "individual owner" of the surplus at the end of those twenty-five years, unless Congress provided otherwise:

> [N]othing herein shall authorize the sale of the oil, gas, coal, or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years . . . *And provided further*, That the oil, gas, coal, and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said

76. Brief for Respondents Williamson and Bowen at 40 note 80.
77. Act of June 28, 1906, §2, paras. 1-5, 34 Stat. 540-41.
78. Id. at §2, para. 7.

> twenty-five years, unless otherwise provided for by Act of Congress.[79]

Respondents make much of the proviso "unless otherwise provided by Act of Congress". However, that proviso was dropped in the course of enacting a 1921 amendment of the 1906 act which added fifteen years to the minerals reservation:

> That all that part of the Act of June 28, 1906 . . . which reserves to the Osage Tribe the oil, gas, coal or other minerals covered by the lands for the selection and division of which provision is made in that Act is hereby amended so that the oil, gas, coal, or other minerals covered by said lands are reserved to the Osage Tribe for the period ending April 7, 1946. . . .[80]

Significantly, an originally proposed version of this amendment would have additionally carried forward the proviso "unless otherwise provided for by Act of Congress".[81]

The *absence* of this proviso, however, did not deter Congress from again amending the provision in 1929 to add yet another twelve years to the term of the minerals reservation—the phrase "for the period ending April 7, 1946" contained in the 1921 amendment was replaced by the phrase "until the 8th day of April, 1958, unless otherwise provided by Act of Congress".[82] Thus, in 1929, Congress re-introduced the "unless otherwise provided" stipulation.

In 1931, after these legislative events, the case *Adams v. Osage Tribe*[83] was brought. In that case plaintiffs were purchasers of "surplus" allotments who claimed title to the

79. *Id.*

80. Act of March 3, 1921, 41 Stat. 1249.

81. 61 Cong. Rec. 2053 (1921).

82. Act of March 2, 1929, 45 Stat. 1478.

83. 50 F.2d 918 (D.C. Okla. 1931).

minerals beneath the allotments on the basis that the initial twenty-five year period of the minerals reservation had expired. Plaintiffs attacked both the 1921 and 1929 extensions of that period, on the ground that Congress could not, consistent with the Fifth Amendment, deprive them of title to the minerals. Both the district court and the Tenth Circuit denied these claims.

As demonstrated above, the "unless otherwise provided" proviso was dropped in the 1921 amendment. Therefore, the Tenth Circuit's upholding of the 1929 amendment could not in fact be based on the existence of an express reservation of power to enact such an amendment. Accordingly, respondents' assertion that *Adams* is founded on the existence of such a proviso is erroneous as a matter of fact.

Moreover, there is a second and more important flaw in respondents' characterization of *Adams*--it does not square with the legal analysis actually performed by the Tenth Circuit, which did not rest on the existence of any specific reservations of power to amend. That legal analysis will now be explicated; it will be seen that it parallels the legal analysis advocated by petitioner herein, to wit—that the initial reservation of minerals in the original act withheld those minerals from allotment and made them subject to Congress' inherent continuing power to alter the plan for their ultimate distribution. The Tenth Circuit reasoned as follows.

The Osage Allotment Act (in the same manner as the Northern Cheyenne Allotment Act) states in plain terms that the minerals "are hereby reserved to the Osage Tribe for a period of twenty-five years," lodges leasing authority

in the tribal council, and provides that the proceeds of mineral development are tribal property:

> The diction used is simple and plain, and its meaning clear to common understanding. The minerals were not to be sold, they were reserved to the tribe for twenty-five years, leases for all minerals to be made through its tribal council with the Secretary's approval, and the royalties on minerals produced paid to the tribe, and the minerals in the allotted lands were to become the property of the individual owners of the lands from and after April 8, 1931, unless otherwise provided by Act of Congress.[84]

Furthermore, the Osage allotment patents (as the Northern Cheyenne allotment patents) specifically "reserved" the minerals to the tribe.[85]

To the allottees contention that—

> . . . these legislative provisions for the administration of the trust estate cannot be given their obviously intended effect, that the act did not divide the land into two estates—(a) surface and (b) minerals, and then provide for deeds to allottees covering only the surface; that . . . the allottees took . . . titles to the minerals as vested remainders. . . .[86]

the Tenth Circuit responded:

> "The 1906 act made no allotment of the mineral estate in the lands; it remained tribal property." The claim that allottees took vested estates in remainder on the issuance of deeds to their allotments is clearly without merit.[87]

Finally, the *Adams* court stated that a proper analysis rested on basic concepts of congressional power to promulgate allotment plans, withhold minerals from allotment,

84. 59 F.2d at 655.
85. *Id.*
86. *Id.*
87. *Id.* at 656.

and subsequently alter the plans for future distribution of those withheld minerals:

> But the discussion so far has been largely directed to propositions advanced by appellants' counsel. In so doing we think the issues of law that control have been too narrowly restricted. The Congress had full power, when it passed the Allotment Act, to make such provisions for safeguarding and administering the communal estate of the tribe, and dividing it in severalty among the members of the tribe, as its informed judgement might dictate, for the benefit of all concerned—whether it would be equitable and just that all tribal property, including minerals under the land, be at once allotted among the members in severalty. There must have been a doubt, well founded in later developments, that minerals, since proven to be of great wealth, could not then be equitably divided, and so Congress chose a method by which that could be and is being accomplished. For that purpose the act provided that the minerals under the lands to be allotted were reserved to the Osage Tribe and were not to be sold. The necessary effect of this was to withhold the minerals from division, and set them apart from the lands to be divided, for the use and benefit of the tribe, not disturbing the tribe's communal equitable estate in them. . . And so we say the reservation in the Allotment Act and the Acts of March 3, 1921, and March 2, 1929, were "but an exertion of the administrative control of the government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued." *Gritts v. Fisher*, 224 U.S. 640, 648, 32 S. Ct. 580, 583, 56 L. Ed. 928.[88]

88. *Id.* at 656-57. Subsequent to *Adams* Congress further amended the Osage Act, culminating in a perpetual reservation of the minerals to the tribe. Act of June 24, 1938, 52 Stat. 1034; Act of October 6, 1964, 78 Stat. 1004.

b. The Other Allotment Acts From Which Respondents Claim This Court May Draw Inferences Regarding the Intent of Congress in Enacting the Northern Cheyenne Allotment Act

Petitioner has argued that the meaning of the Northern Cheyenne Allotment Act of 1926 should be determined from the plain language of the Act,[89] the corroborating language of the allotment patents,[90] the circumstances surrounding enactment, in particular the needs and expressed desires of the Tribe,[91] and the legislative history of the Act.[92] This method for the interpretation of a specific allotment act, which accords preeminent weight to the actual language of the *involved* act and the circumstances surrounding *its* enactment, in fact conforms completely to the method recently prescribed by this Court for interpreting allotment legislation in *DeCoteau v. District County Court*, ___ U.S. ___, 43 L.Ed.2d 300, 95 S.Ct. 1082 (1975). The "face of the Act", its "surrounding circumstances", and its "legislative history" are to be accorded paramount weight.[93]

However, respondents Williamson and Bowen claim that this technique should be discarded in favor of a method directly contrary. They assert that this Court should look to the language of certain other independent allotment acts for the purpose of drawing inferences regarding Congress' intent in enacting the Northern Cheyenne Act. In support of this method of analysis they cite[94] one case, *Monson v.*

89. Brief for Petitioner at 15-18.

90. *Id.* at 18-20.

91. *Id.* at 58-66.

92. *Id.* at 66-76.

93. 43 L. Ed. 2d at 314. *Accord, Rosebud Sioux Tribe v. Kneip*, 521 F.2d 87, 89-91 (8th Cir. 1975); *United States ex rel. Cook v. Parkinson*, 525 F.2d 120, 122-23 (8th Cir. 1975).

94. Brief for Respondents Williamson and Bowen at 43.

Simonson, 231 U.S. 341 (1913), which in fact lends no support. *Monson* did not compare the language of independent acts; rather, it compared language contained within different portions of a single act.

Furthermore, careful analyses of the other allotment acts cited by respondents fully confirm the inherent weakness of the comparative technique advocated. The results of such analyses are described in the Brief for Petitioner.[95] In short, each of those other allotment acts is generically different from the Northern Cheyenne Act. They in fact embody massive assaults on the tribal system of property. For example, each of them provides for the disposition of essentially all of the lands of the reservation, through allotment to members or sale to whites. Significantly, none of them contains provisions remotely comparable to the control and management stipulations in sections 1 and 3 of the Northern Cheyenne Act.

To draw inferences from these other acts about Congress' intent in enacting the uniquely limited Northern Cheyenne Act—the last original allotment act Congress was ever to enact—is simply not justifiable. And, to ask, as respondents do, that this Court infer that Congress intended to relinquish aspects of management and control in the Northern Cheyenne Act which were not relinquished in these other acts, is clearly improper.

More specifically, there is no sound basis for concluding that Congress, in enacting these other acts, actually considered these various reserved power provisos essential to the preservation of a power to amend. Consider, for example, the Osage Act of 1906.[96] In that act the proviso "unless

95. Brief for Petitioner at 76-78.

96. Act of June 28, 1906, 34 Stat. 539.

otherwise provided by Act of Congress" appears in the portion of the act (§2, 7th para.) which, as explained at 25 *supra*, deals with the rights of an allottee who might be declared "competent". Such an allottee is, by that part of the act, permitted to convey the "surplus" portion of his allotment. However, he is specifically prohibited from selling the minerals beneath those "surplus" lands:

> [N]othing herein shall authorize the sale of the oil, gas, coal, or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years. . . *And provided further*, That the oil, gas, coal, and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress.[97]

The final "unless otherwise provided" clause has reference *only* to the minerals beneath "surplus" lands held or sold by "competent" Indians.[98] Moreover, the portion of the Osage Act (§3) which in fact reserves *all* minerals beneath the reservation to the tribe does *not* include an "unless otherwise provided" clause. Thus, the reserved power proviso contained in the Osage Act applies only to a portion of the reserved minerals, and, therefore, does not in fact support the subsequent blanket extensions of the period of the minerals reservation.

Finally, as discussed at 26 *supra*, Congress alternately dropped and re-introduced an "unless otherwise provided" clause in subsequent amendments of the Osage Act. This

97. *Id.* at §2, 7th para.

98. The "unless otherwise provided" clause qualifies only the future interest in the minerals of the "individual owner." Since the act otherwise consistently uses the term "member" when referring to actual allottees, it clearly appears that the provisio is directed only at "surplus" lands held or sold by "competent" allottees.

cavalier treatment of the proviso confirms that Congress has not viewed its power to amend as being dependent on an express reservation of authority.

Similarly, study of the legislative history of the Crow Allotment Act of 1920[99] reveals that the comparable proviso contained in that act was in fact not viewed by Congress as essential to the preservation of a power to extend the period of the minerals reservation. The originally proposed Crow act preserved the minerals to the tribe for fifty-years and did not include specific language reserving power to extend that period.[100] However, the House committee recommended changing the period of the minerals reservation from fifty-years to twenty-five years.[101] This suggested amendment was adopted by the House after vigorous debate.[102] In the course of that debate, a compromise was suggested:

> Mr. McKeown. Would it help the situation if it were provided that "said period of time may be extended by Congress"?
>
> Mr. Walsh. Congress could do that without the right being reserved. . . .[103]

The Senate refused to accept the amendment to twenty-five years and a conference committee was appointed.[104] The Senate conferees accepted the House amendment qualified by the language "unless otherwise ordered by Congress."[105] Thus the compromise suggested by Mr.

99. Act of June 4, 1920, 41 Stat. 751.

100. *Hearings on S.2890 Before the Senate Comm. on Indian Affairs*, 66th Cong., 1st Sess. at 4, 13 (1919).

101. H.R. Rep. No. 468, 66th Cong., 1st Sess. at 2 (1919).

102. 59 Cong. Rec. 6010-11 (1920).

103. 59 Cong. Rec. 6010 (1920).

104. 59 Cong. Rec. 6568, 6668 (1920).

105. H.R. Rep. No. 1043, 66th Cong., 2d Sess. at 2, 4 (1920).

McKeown was adopted. The proviso, therefore, was included simply to resolve a conflict between the two houses over the initial duration of the minerals reservation. It was decidedly not included to preserve Congress' inherent power to extend that period.

The conference committee's compromise, "twenty-five years unless otherwise ordered by Congress", was accepted by both houses.[106] On June 4th, 1920 the President signed the act.[107] However, the act as it appeared in the Statutes at Large inexplicably provided for a fifty-year minerals reservation "unless otherwise ordered by Congress".

Two points emerge from this analysis. First, Congress reserved the minerals to the tribe for only twenty-five years. Second, the "unless otherwise ordered" clause was not inserted as a reservation of power to change the period of the minerals reservation; that Congress had that power was never in dispute; rather, it was simply a product of Congressional disagreement over the initial duration of the period.

3. *Respondents' Analysis*[108] *of the Legislative History of the 1926 Act Is Not Sound.*

As discussed in the Brief For Petitioner,[109] the surrounding circumstances and legislative history of the 1926 Act establish, consistent with the terms of the Act and allotment patents, that both Congress and the Northern Cheyenne people intended the 1926 Act to serve two specific functions: all lands and natural resources of the Reservation

106. 59 Cong. Rec. 7845, 7874 (1920).

107. 59 Cong. Rec. 7845, 7874, 8156, 8160, 8620 (1920).

108. This analysis is found at pages 33-35 of Brief For Respondents Williamson and Bowen.

109. Brief For Petitioner at 57-78, 15-20.

were to be confirmed and preserved in tribal ownership to be held and used for the benefit of the Tribe as a whole; and limited allotments were to be made from those tribal lands to enable the development of individual homesteads. Respondents contend, however, that the legislative record contains "strong evidence" of an intent "not to delay *vesting* the minerals."[110]

In point of fact, the legislative record contains no evidence whatsoever stating *explicitly* the rationale for providing for the transfer of minerals fifty-years hence. However, the record does contain an indisputable theme regarding the minerals—they were to be withheld from allotment so that they might be developed for the benefit of all the people. In light of this central theme, the function of the provision calling for a transfer fifty-years hence is readily identified. Believing that fifty-years offered "a means for the development of any mineral resources, such as oil, which may be discovered on the reservation for the benefit of the tribe",[111] Congress undoubtedly proceeded on the basis that it would be sensible to thereafter unify title to both surface and subsurface in the allottee. Accordingly, in 1968, upon realizing that the essential intent regarding tribal mineral wealth was as yet unrealized, Congress provided for the continuance of tribal ownership and control over minerals. Furthermore, being advised by the Department of the Interior that continuing that ownership for a finite period "would create an extremely difficult and costly requirement for determining the heirs",[112] Congress continued tribal ownership in perpetuity.

110. Brief For Respondents Williamson and Bowen at 35 (emphasis in the original).

111. 67 Cong. Rec. 9886 (1926) (remarks of Representative Leavitt).

112. S. Rep. No. 1145, 90th Cong., 2d Sess. 2 (1968).

Respondents seize upon the facts that an early proposed version of the 1926 Act provided that "only the surface" would be allotted and that this phraseology does not appear in the final act.[113] Careful analysis, however, reveals that this change is in no way indicative of an intent to vest rights in the subsurface estate in the allottees. The originally proposed bill provided that only agricultural lands would be listed for allotment, and that prior to allotment those lands would be examined for mineral content by the Geological Survey. If any of those listed lands were found to contain minerals, then only the surface would be allotted and the minerals would remain with the tribe.[114] The Senate Committee on Indian Affairs, however, deleted the provision requiring the Geological Survey to determine the mineral content of lands listed for allotment, and substituted the blanket reservation to the tribe of *all* minerals on the reservation, which appears in the final act.[115] Therefore, respondents' argument that this adjustment in language indicates a Congressional intent "not to delay *vesting* the minerals"[116] is untenable. Moreover, this broadening of the minerals reservation indicates quite the contrary.

4. *Respondents' Non-Indian Authorities*[117] *Are Wholly Irrelevant to the Case at Hand.*

The Brief for Petitioner and this Reply Brief set out that substantial body of federal Indian law decisions of this Court dealing with the power of Congress, in light of the

113. Brief For Respondents Williamson and Bowen at 33-35.

114. H.R. 9558, 69th Cong., 1st Sess. (1926) (Brief For Petitioner at A-11).

115. S. Rep. No. 638, 69th Cong., 1st Sess. 2 (1926) (Brief For Petitioner at A-15).

116. Brief For Respondents Williamson and Bowen at 35 (emphasis in the original).

117. Brief For Respondents Williamson and Bowen at 28-29.

Fifth Amendment, to amend allotment legislation. Without question, this body of decisions establishes that congressional amendment of an executory portion of a statutory allotment plan "takes" no vested property rights. These decisions, without exception, are based on principles arising from the unique legal status of Indian tribes under federal law and the accompanying plenary power of Congress.

Disregarding this Court's 1972 decision, *United States v. Jim*, 409 U.S. 80, respondents seek to avoid the force of this body of federal Indian law decisions by pointing[118] to certain decisions of this Court which are said to mark the decline of what respondents term the "privilege doctrine" in constitutional adjudication. However, these decisions are wholly irrelevant to the instant case for the following reasons.

First, the decisions cited by respondents are intrinsically different from the instant case—they do not involve adjudications within the special historical and legal context of federal Indian law. Thus, for example, while conventional equal protection analysis was performed in *Shapiro v. Thompson*, 394 U.S. 618 (1968), *Graham v. Richardson*, 403 U.S. 344 (1971), *Jimenez v. Weinberger*, 417 U.S. 628 (1974), and *Weinberger v. Wiesenfeld*, — U.S. —, 43 L. Ed.2d 514, 95 S. Ct. 1225 (1975), to strike down invidiously discriminatory statutory classifications based respectively on residence, citizenship, status of birth, and gender, this Court in 1974 denied a claim that it was invidiously discriminatory to establish statutory classifications according preference to Indians in governmental employment, on the following analysis:

> Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and

118. *Id.*

> upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status, to legislate on behalf of federally-recognized Indian tribes. The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. . . .

Morton v. Mancari, 417 U.S. 535, 551 (1974).

Moreover, the cases cited by respondents are, in yet another sense, generically different from the case at hand. The issue in the instant case concerns the substantive nature of respondents' rights under the 1926 Northern Cheyenne Allotment Act—specifically, whether they have progressed to the point of being vested property rights within the meaning of the Fifth Amendment, not subject to congressional alteration. Respondents' authorities, however, do not in fact involve inquiries into the substantive nature of rights acquired under legislation—these authorities are in fact wholly unconcerned with the question of whether the involved legislation has given rise to rights which have vested and are therefore immune from subsequent congressional alteration. Rather, the cases cited by respondents deal with entirely different issues of governmental power, to wit: (1) the constitutional validity of the *formulation* of legislation adopted by the government for the dispensation and administration of various benefits and opportunities;[119] (2) the constitutional validity of the *procedures*

119. *Sherbert v. Verner*, 374 U.S. 398 (1963) (legislative provision abridges right to free exercise of religion); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (legislative classification impinges on constitutional right to travel and therefore violates equal protection); *Graham v. Richardson*, 403 U.S. 344 (1971) (statutory classification based on alienage violates equal protection); *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (legislative classification based on status of birth violates equal protection); *Weinberger v. Wiesenfeld*, — U.S. —, 43 L. Ed. 2d 514, 95 S. Ct. 1225 (1975) (legislative classification based on gender violates equal protection).

employed by the government in terminating eligibility for the legislative benefits and opportunities.[120] Thus, while it was reasoned in these cases that the government's obligations to *formulate* and *administer* the involved legislative programs consistent with the constitutional requirements of equal protection, freedom of religion, and procedural due process, could not be avoided on the ground that benefits under the program were mere "privileges",[121] it was decidely *not* held that the benefits to be accorded were vested under the Fifth Amendment and insulated from further congressional action. In fact, the only case cited by respondents dealing with this latter issue, *Flemming v. Nestor*, 363 U.S. 603 (1960), specifically upheld a congressional amendment terminating social security benefits which had been previously available under the Social Security Act.

5. *The Argument*[122] *That Respondents Acquired Vested Rights in the Minerals Under the 1868 Treaty Is Invalid.*

Respondents assert [123] that they acquired vested rights to the minerals beneath their allotments by virtue of the Treaty with the Northern Cheyenne and Northern Arapaho,

120. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (termination of welfare benefits without prior hearing violates procedural due process); *Wheeler v. Montgomery*, 397 U.S. 280 (1970) (termination of welfare benefits without prior hearing violates procedural due process); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (revocation of parole without prior hearing violates procedural due process); *Arnett v. Kennedy*, 416 U.S. 134 (1974) (discharge of federal employee without prior hearing does not violate procedural due process).

121. *Weinberger, supra* at 523-24; *Morrissey, supra* at 481; *Graham, supra* at 374; *Goldberg, supra* at 262; *Sherbert, supra* at 404-06. *But see Arnett, supra* at 151-52.

122. Brief for Tribal Respondents at 3, 6, 7-11, 11-19.

123. *Id.*

May 10, 1868, 15 Stat. 655.[124] This claim is totally devoid of merit—either factual or legal—for the following reasons.

a. No Factual Basis

The reservation lands that were to be set aside under this treaty[125] are *not* the reservation lands involved in the instant case. The treaty contemplated that the Northern Cheyenne and Northern Arapaho were to be settled either on lands contained in the present state of *Oklahoma*[126] or *South Dakota*.[127] However, the Northern Cheyenne did not in fact settle on the lands specified in that treaty. Instead they remained in Montana, defeated Custer at Little Bighorn in 1876, were banished to the Indian Territory in Oklahoma in 1877, and one year later commenced the 1,500-mile trek back to Montana to reclaim their homeland which is now the Northern Cheyenne Reservation.[128] Accordingly, the Northern Cheyenne Reservation rests exclusively on the Executive Orders of November 26, 1884,[129] March 19, 1900,[130] and the 1926 Act.[131]

124. *Id.*, Appendix A.

125. The treaty states that the Northern Cheyenne and Northern Arapaho were to accept either some portion of the reservation created by the Treaty with the Southern Cheyenne and Arapaho, October 28, 1867, 15 Stat. 593, or some portion of the reservation created by the Treaty with the Sioux (Brulé and other Bands) and Arapaho, April 29, 1868, 15 Stat. 635.

126. Treaty with the Southern Cheyenne and Arapaho, October 28, 1867, art. 2, 15 Stat. 593.

127. Treaty with the Sioux (Brulé and other Bands) and Arapaho, April 29, 1868, art. 2, 15 Stat. 635.

128. M. SANDOZ, CHEYENNE AUTUMN (1953).

129. I C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 860 (1904).

130. *Id.*

131. Moreover, the provision, (art. III), in the 1868 Treaty with the Northern Cheyenne and Northern Arapaho which is asserted by respondents to have created vested rights to minerals, states that the lands "shall cease to be held in common" when "selected, certified, and recorded in the 'Land Book' ". It further provides that each selection shall be evidenced by a "certificate" recorded in the "Land Book". Additionally, the Indian was to have "exclusive possession" only "so long as he or they may continue to cultivate it". The record in this case provides no basis whatsoever for determination of these factual matters.

b. No Legal Basis

Ignoring for a moment the glaring factual difficulties with respondents' treaty theory, the record in this case indicates that *none* of the lands of the Northern Cheyenne Reservation had in fact been allotted at the time of enactment of the 1926 Act.[132] In this circumstance, Congress in 1926 had complete authority to enact allotment mechanisms which would supercede any allotment scheme contemplated in a prior treaty. *Chase, Jr. v. United States*, 256 U.S. 1 (1921); *Nadeau v. Union Pacific R.R.*, 253 U.S. 442 (1920); *United States v. Chase*, 245 U.S. 89 (1917); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899).[133]

6. *The Argument[134] That the 1968 Amendment Subjects Tribal Mineral Development to State Taxation and Therefore Constitutes a "Taking" Is Both Improper and Invalid.*

At the outset, it is imperative to realize that respondents Williamson and Bowen's argument[135] has no proper place in the instant case. The issue before this Court is whether *respondents* were deprived of vested property rights by the 1968 Amendment.[136] This taxation argument, however, is

132. Brief for Petitioner at A-13; Appendix at 47, 49, 50-51, 53-55.

133. Brief for Petitioner at 26-28, 21-22.

134. Brief for Respondents Williamson and Bowen at 46-49.

135. *Id.*

136. The issue before this Court has been specified by Congress as—

> . . . whether under the provisions of the Act of June 3, 1926, as amended, *the allottees, their heirs or devisees,* have received a vested property right in the minerals. . . .

Act of July 24, 1968, 82 Stat. 425. Respondents Williamson and Bowen themselves agree that the "Issues Presented" are:

> (1) Did the Northern Cheyenne Indian *allottees* receive a vested, or constitutionally protected interest in the minerals. . . .
>
> (2) May Congress divest such *individual interest*. . . .

Brief for Respondents Williamson and Bowen at 1-2. *Accord,* Brief for Tribal Respondents at 2-3; Brief for Petitioner at 2-3.

addressed to the vested property rights of *petitioner*—it is argued that the effect of the 1968 Amendment will be to confiscate *tribal* property for the benefit of the state of Montana. Such an argument is patently inappropriate. Moreover—assuming that these *non*-tribal respondents possess standing to assert the property rights of the Tribe—the argument has no legal merit.

Respondents Williamson and Bowen argue that 25 U.S.C. §398c, which authorizes state taxation of—

> . . . improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations. . . .

applies to lessees of *tribal* minerals, but not to lessees of allotted minerals. Respondents conclude that if the perpetuation of tribal ownership were permitted, the result would be an impermissible "taking" of tribal property through state taxation, which, they argue, would not occur if the minerals were to be transferred to the allottees in accordance with the original Congressional plan. This argument, which is supported by the citation of one irrelevant case (*Squire v. Capoeman*, 351 U.S. 1 (1955)), is invalid for a number of reasons.

Before demonstrating this invalidity, it must be noted that this argument—which respondents assert serves to assure that "all the royalties from the coal at issue remain under Indian control for Indian use and benefit"[137]—is in fact being championed by representatives of that portion of the respondent-class consisting exclusively of persons who are *not* members of the Northern Cheyenne Tribe.[138] If

137. Brief for Respondents Williamson and Bowen at 48.

138. This portion of the class consists of approximately 250 persons, including Indians who are not Northern Cheyennes and persons who are white (*See* Brief for Petitioner at 4). As a matter of fact, respondent Bowen is himself a white man.

these non-Northern Cheyenne respondents prevail in this argument, *they* will acquire ownership of a substantial[139] portion of the Northern Cheyenne mineral wealth.

Moreover, respondents' argument is inherently circular. Under their Fifth Amendment premise, §398c could not have applied to tribal mineral development *ab initio*. For, if, as respondents argue, *continuing* to subject the tribal mineral estate to state taxation constitutes a "taking", then the *original* subjection of that estate to taxaion was also a "taking". In 1926, Congress, with the enactment of the Northern Cheyenne Allotment Act, "recognized" tribal title to the Reservation. That recognition endowed the Tribe with a vested property interest in the entire Reservation.[140] In 1927, Congress enacted 25 U.S.C. §398c.[141] Therefore, if respondents' Fifth Amendment premise is sound, then from the outset §398c could not have, consistent with due process, been applicable to the minerals on the Reservation. Accordingly, accepting respondents' premise, the 1968 Amendment will not have the effect of subjecting tribal mineral development to state taxation.

In any event, respondents' taxation argument has no legal merit, for the following reasons.

First, §398c has never been applicable to the Northern Cheyenne Reservation. This provision was enacted as part of the Act of March 3, 1927, 44 Stat. 1347, legislation enact-

139. Approximately 17% of the respondent class is non-Northern Cheyenne. Presumably these non-Northern Cheyenne respondents would acquire some commensurate portion of the mineral wealth of the Tribe if they prevailed in this action.

140. *See generally Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942); *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169 (1947); *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949) (dictum).

141. Act of March 3, 1927, §3, 44 Stat. 1347.

ed because of conflicting opinions as to whether there existed statutory authority for mineral-leasing on purely executive order reservations.[142] This conflict stemmed primarily from the tenuous and uncertain nature of title based only on executive order. The purpose of the 1927 act, then, was to provide clear-cut statutory authority for the leasing of minerals on such reservations.[143] The act was decidedly not addressed to mineral-leasing on reservations which had been "recognized" by Congress. By 1927, there was in fact no need for such authority with respect to the Northern Cheyenne Reservation. Congress had already "recognized" tribal title with the enactment of the Northern Cheyenne Allotment Act of 1926. Moreover, that 1926 Act itself set forth a specific mechanism for leasing of minerals. Accordingly, the 1927 act has never been applicable to the Northern Cheyenne Reservation. Additionally, the case *British-American Oil Producing Co. v. Board of Equalization*, 299 U.S. 159 (1936), *rehearing denied*, 299 U.S. 624 (1937), supports the proposition that the Northern Cheyenne Reservation is not an executive order reservation within the meaning of the Act of March 3, 1927. In that case, this Court held that the Blackfeet Reservation, which like the Northern Cheyenne Reservation rests on a succession of actions by the Executive and Congress, was not an executive order reservation within the meaning of the 1927 act.

Second, assuming *arguendo* that the Act of March 3, 1927 initially applied to the Northern Cheyenne Reservation, it would have been, in any event, superceded by the Act of May 11, 1938, 52 Stat. 347, 25 U.S.C. §§396a-f. This

142. Comment, *Tribal Property Interests In Executive-Order Reservations: A Compensable Indian Right*, 69 YALE L.J. 627, 632 (1960).

143. *Id.* at 632-37.

comprehensive leasing act was enacted for the purpose of replacing the prior fragmentary legislation pertaining to mineral-leasing on Indian lands.[144] In fact, the Northern Cheyenne Allotment Act states specifically that leasing of minerals is to be governed by this 1938 act. [145]

Finally, the above analyses notwithstanding, and assuming that on some basis the Act of March 3, 1927 is applicable to the Northern Cheyenne Reservation, the following points must nevertheless be made. The 1927 act applies only to leasing—accordingly, the taxation provisions would not apply to development arrangements other than leasing.[146] Moreover, the full text of the 1927 act indicates that its coverage is limited only to oil and gas development.[147] Therefore, respondents' preoccupation with the Montana coal severance tax is not justified.

Additionally, respondents' interpretation that 25 U.S.C. §398c applies to leasing of tribal minerals, but not to leasing of allotted minerals, ignores the broad terms of that provision—state taxation is authorized with respect to "*any lessee* upon *lands* within Executive order Indian reservations." The case, *Squire v. Capoeman*, 351 U.S. 1 (1955), which respondents cite in support of their interpretation is in fact inapposite. First, *Squire* deals with the question of whether a *general* provision of the Internal Revenue Code

144. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 695-98 (2d ed. 1958). Section 7 of the Act of May 11, 1938 contains a general repealer clause. 52 Stat. 348.

145. Act of September 22, 1961, 75 Stat. 586, as amended by the Act of July 24, 1968, 82 Stat. 424 (*See* Brief for Petitioner at A-5-6).

146. Ziontz, *Indian Self-Determination: New Patterns for Mineral Development*, INST. ON INDIAN LAND DEVELOPMENT, ROCKY MT. LAW FDN. 13-1, 13-8 (1976).

147. *See* DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 695 (2d ed. 1958).

was intended to tax proceeds from the sale of timber on allotted lands. Therefore, it is by no means dispositive of the issue at hand, which involves a tax provision dealing *expressly* with Indian lands. Furthermore, it decidedly does not express a rule of interpretation favoring taxation of tribal over allotted interests.

7. *The Argument That "The Tribe's Legislative Authority"[148] Can Adequately Control Any and All Reservation Mineral Development Is at Best Overstated If Not Invalid.*

While not a legal issue in the case at hand, the contention is raised by respondents that tribal authority is "broad enough to adequately regulate *any* coal development within the Reservation."[149] Petitioner indeed agrees that tribal sovereignity and authority are significant doctrines of Indian law. However, contrary to respondents' simplistic if not glib treatment of these doctrines, in actuality the current scope of tribal sovereignty and authority is by no means precisely-defined or well-settled. For example, as recently proclaimed within *United States v. Mazurie*, 419 U.S. 544 (1975), Indian tribes "possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life;"[150] yet this Court in *Mazurie* went on to state that it "need not decide whether this independent authority is itself sufficient for the tribes to impose Ordinance No. 26 [a tribal liquor ordinance]."[151] With issues as basic as this one still unresolved by this Court, it truly strains credulity for respondents to take the position that tribal sovereignty and authority are a most certain panacea

148. Brief for Respondents Williamson and Bowen at 46.

149. *Id.* at 47 (emphasis in the original).

150. 419 U.S. at 557.

151. *Id.*

in the face of the myriad of problems which would flow from strip-mining on the Reservation.

Moreover, beyond the fact that tribal sovereignty and authority are less than sharply-delineated doctrines, protections — such as due process — afforded individuals, both Indian and non-Indian, under the 1968 Indian Civil Rights Act [152] would raise a whelter of potential issues and litigation in the face of tribal attempts to adequately regulate individuals' coal development within the reservation. Summarily, in light of this tension between tribal powers and the Indian Civil Rights Act, respondents' tribal powers argument is all the further undermined.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

March 23, 1976

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152. 25 U.S.C. §1302 *et seq.* (1970).